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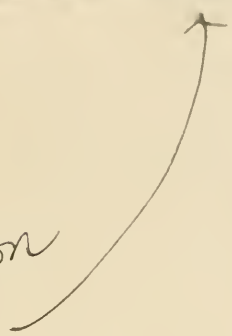


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CASES ON SELECTED TOPICS
IN
THE LAW OF PERSONS.

CASES ON SELECTED TOPICS
IN
THE LAW OF PERSONS.

BY
JEREMIAH SMITH,
STORY PROFESSOR OF LAW IN HARVARD UNIVERSITY.

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SELECT CASES

ON

THE LAW OF PERSONS.

PART FIRST.

PARENT AND CHILD.

CHAPTER I.

CUSTODY OF CHILD.

REX *v.* GREENHILL.

1836. 6 *Neville & Manning*, 244.

In the Court of King's Bench.

The material facts of this case were as follows : —

In 1829, Miss Henrietta Lavinia Macdonald (daughter of Col. John Macdonald, of Exeter), was married to Benjamin Cuff Greenhill, Esq., of Knowl Hall, in Somersetshire. They had issue three daughters, of whom the eldest was under six years old, the youngest two and a half years. In July, 1835, Mr. and Mrs. Greenhill and their family went to reside at Weymouth. On the 24th of September, 1835, Mrs. Greenhill discovered that her husband (who was then in London) had for more than a twelvemonth carried on an adulterous intercourse with a woman of the name of Graham: that he and this Mrs. Graham had, in fact, been living together and passing as man and wife, in London, at Portsmouth, and at other places, sometimes calling themselves Mr. and Mrs. Greenhill, and sometimes Mr. and Mrs. Graham. This information occasioned Mrs. Greenhill great affliction, and she thought it necessary to go immediately, with her children, to the house of her mother, at Exeter; but having in her possession only a few pounds, which would have been insufficient, or barely sufficient to defray the expenses of herself and her children to Exeter, and being in her distress most anxious to obtain the advice of her mother, she, by the next mail after she received the information, left Weymouth alone,

and travelled to Exeter, where she arrived on the 25th of September. Having there obtained the necessary pecuniary assistance to enable her to take her children to Exeter, she, on the 26th September, went with her brother and sister from Exeter, for the purpose of bringing her children there; but having arrived at Winterborne (distant about ten miles from Weymouth), she and her sister waited there, whilst her brother, at her request, went on to Weymouth, and brought her children to her. Mrs. Greenhill immediately went with them to the house of her mother at Exeter, where they remained under her care up to the morning of the 27th of October.

There were conflicting statements, as to whether or not Mr. Greenhill had previously agreed that Mrs. Greenhill should visit Mrs. Macdonald at Exeter, at this time.

On the 23d of October, a writ of *habeas corpora* was issued at the instance of Mr. Greenhill, commanding his wife to produce the children on the evening of the 28th before Patteson, J., at his residence in Bedford Square. Mrs. Greenhill had previously instituted a suit against her husband for a divorce *à mensâ et thoro*, on the ground of adultery, and which suit is still pending.

As soon as the *habeas corpora* was known to have issued, and before its return, a suit in Chancery was instituted for the purpose of making the children wards of that court, and a petition in that cause was presented praying the protection of the court, and that a proper guardian might be appointed for the children.

On the night of the 28th of October, in obedience to the *habeas*, Mrs. Greenhill having arrived with her children from Exeter, appeared with them before Patteson, J. Some argument by counsel on each side took place before his Lordship, who ultimately allowed the matter to stand over till the evening of Thursday, the 5th November, the children meantime remaining with their mother, and their presence being dispensed with by the consent of both parties.

On the morning of the 5th November, the petition in the cause in Chancery was heard by Shadwell, V. C., in his private room, but failed; his Honor being of opinion, that however immoral the conduct of Mr. Greenhill might be, unless that conduct were brought so under the notice of the children as to render it probable that their minds would be contaminated, the Court of Chancery had no authority to interfere with the common-law right of the father to the custody of his children; that in this case there was this further difficulty in procuring the intervention of the Court of Chancery in favor of the children, that there was no fund out of which the court could see that the children would be maintained, for, although the marriage settlement of Mr. and Mrs. Greenhill provided a jointure of £800 per annum for Mrs. Greenhill, after her husband's death, and enabled the trustees to raise £12,000 for the benefit of the children, neither of these funds are available during Mr. Greenhill's life. The Vice-Chancellor, therefore, dismissed the petition.

On the evening of the 5th November, Patteson, J., was again attended by counsel on each side, and on the 10th of November his Lordship made an order that Mrs. Greenhill should deliver to Mr. Greenhill his three children.

Mr. Greenhill stated that he had expressed to his wife his contrition, and the pain he felt at the anguish he had occasioned her, but that she had rejected every attempt at reconciliation; that Mrs. Graham had never seen his children or his wife, and that he had not taken any of his children near Mrs. Graham's residence; that he never entertained a thought of bringing his children or wife in contact with Mrs. Graham; that he was warmly attached to his children, and that his affection had hitherto been returned; that it was his intention to take his children to his residence at Knowl Hall, where he proposed that they should permanently reside under the care and superintendence of his (Mr. Greenhill's) mother, and that he was willing that his wife should have free access to them.

Wilde, Serjt., moved [in the King's Bench] for a rule *nisi* to set aside the order of Patteson, J.

A rule *nisi* was granted.

Campbell, Attorney-General, *Talfourd*, Serjt., and *Wightman* showed cause against the rule.

The question is, whether the circumstance of a husband's engaging in an intrigue, taken alone, justifies the wife in detaining the children from the custody of that husband. These children are taken away on a personal provocation. Is that at all to vary the rights of the parties? There is no doubt that by law the father is entitled to the custody of his children. Even in the case of gross immorality, this court will not interfere, but leave the matter to be dealt with by the Court of Chancery. The wife is not entitled to the custody of the children, in opposition to the claims of the husband. In Blackstone's Commentaries, vol. i. p. 453, it is said, "The legal power of a father (for a mother, as such, is entitled to no power, but only to reverence and respect),¹ — the power of a father, I say, over the persons of his children, ceases at the age of twenty-one." In *Rex v. De Manneville*, 5 East, 221, this question was much considered, and that case is an express authority to show that under the present circumstances Mrs. Greenhill had no right to detain these children. In that case the mother had obtained a writ of *habeas corpus*, directed to the defendant to bring up the body of an infant of eight months old. It appeared that the father was a Frenchman, and the mother an Englishwoman, and that this was their only child; that not long after their marriage the mother had separated herself from the father, on account, as she alleged, of ill treatment, and kept the child, whom she was nursing, with her. The father found means, by force and stratagem, to get into the house where the mother was, and forcibly

¹ L'enfant à tout âge doit honneur et respect à ses père et mère. Il reste sous leur autorité jusqu'à sa majorité ou son émancipation. Le père seul exerce cette autorité durant le mariage. Code Civil des Français, Nos. 371, 372, 373.

took the child, then at the breast, and carried it away almost naked, in an open carriage, in inclement weather, with a view, as the mother apprehended, of taking it out of the kingdom. The court, notwithstanding that the father had obtained possession of the child by fraud and stratagem, refused to interfere. *Rex v. De Manneville* is commented upon and recognized in *Ex parte M' Clellan*, 1 Dowl. P. C. 81. In *Ex parte Skinner*, 9 Moore, 278, all the cases are collected, and the true distinction is taken, — that this court has no discretionary power to control the right of a father to the possession of his child, although such a jurisdiction may be vested in the Court of Chancery, as representing the king as *parens patriæ*. Cases have been referred to, to show that this court will not always interfere to give to the father the custody of his children; but in all those cases the children were of an age to judge for themselves.

[Remainder of argument omitted.]

Sir W. Follett and John Henderson, contra. It is not contended that this court has the power to take the child from the father, which is what was asked in the case of *Ex parte Skinner*. But surely the court will pause before it makes an order to deprive children of so tender an age of the care and superintendence of the mother. The court may be quiescent, and is not bound to act. If this rule is made absolute, Mrs. Greenhill will have no means of superintending the education of her infant daughters, nor will she be able even to see them; for in *Ball v. Ball*, 2 Sim. 35, the Vice-Chancellor decided that he had no power to order the father to permit the mother to have access to her child. There are, no doubt, *dicta* in the books that the father is entitled to the custody of his children, and the husband to the society of his wife. But it is a very different question whether this court will make an order in the one case or the other. It is not contended that the mother has a right to apply for a *habeas corpus* to take the child from the father. All that is contended for is, that the court is not bound to make an order.

[Remainder of argument omitted.]

LORD DENMAN, C. J. This is a rule obtained for setting aside an order, which directs that the children of Mr. Greenhill should be delivered up to him; and as, unfortunately, the attempts to arrange the matter have failed, we are now bound to pronounce what we believe to be the law upon the subject. There is no doubt whatever that where a father has the custody of his children, he is not to be deprived of them except under such circumstances of misconduct as do not occur in the present case; for though Mr. Greenhill is charged with misconduct, yet there is nothing in the case stated with respect to his conduct which has ever been held sufficient to deprive a father of the custody of his children. I am much disposed to think that when the children were in the house which the father had rented, the act of the mother in carrying the children away was equivalent to taking them out of the custody of the father. That state of things would give him, *ex concessis*, a com-

plete right to have them ; but I think it right to act on the general rule. No doubt ought to exist in the public mind on this subject. A decision on a particular state of facts alone might raise a doubt as to whom the custody of children might properly be considered to belong to, and might lead to the greatest family discord, and might thus endanger the lives of the most helpless part of mankind. The effect of the *habeas corpus* is, that the individual is brought before the court, and if he be of an age capable of taking care of himself, he may elect where he will go ; but if the person be of such an age that he cannot take care of himself or protect himself from the seductions of the world, to allow him to choose where he will go, would be only exposing him to danger. In that case the court is bound to make such order as will place the child in the proper legal custody. Then, what is that custody? Upon that no doubt can be entertained. The custody of the father is the proper legal custody. When there is danger to the infant in intrusting it to the care of the father, the court will not act upon the jurisdiction which they possess. Therefore, if there were well-founded apprehensions of the father's acting with extreme harshness or cruelty, or with gross profligacy or immoral conduct, so that the child would be in danger of contamination, the court would not order the child to be delivered to him. Here, it is impossible to say that any danger of that kind is to be expected. There is nothing to make it probable that such an event will take place. It is true that the father has formed an illicit connection ; but it is not pretended that the woman with whom the connection has been formed was living in the father's house, or that his conduct in this connection has been marked with any offensive indecency. As far as the husband's assurances may be taken, they are distinctly given that he would not bring the children into contact with the woman in question ; and it is not to be presumed that he would violate the assurances he has thus given. I must say, that, looking at the particular facts of this case, I consider the removal of the children from the husband's house at Weymouth to be, in point of law, a surreptitious proceeding. This rule was certainly not granted from any feeling of doubt, but from a sincere desire of preventing the occurrence of further misfortunes to this unhappy family. We do not feel that we could make any modified order ; and we cannot entertain any doubt that my Brother Patteson acted rightly.

[The concurring opinions of LITTLEDALE, WILLIAMS, and COLERIDGE, JJ., are omitted.]

Rule discharged.

CREUZE v. HUNTER.

1790. 2 *Cox's Chancery Cases*, 242.

BEFORE Lord Chancellor THURLOW.

This was a petition stating the entangled state of Mr. Hunter's property; that he was an outlaw and resided abroad, and that his son, an infant, was entitled in remainder to a very considerable estate, as also to a maintenance by the will of his grandfather; and prayed that Mr. Hunter might be restrained from taking his son abroad or improperly interfering with his education, which was then principally directed by his mother, who lived separate from her husband.

Affidavits were filed on both sides, imputing very improper conduct to both father and mother.

Upon the petition first coming on, the Lord Chancellor threw out that he would not allow the color of parental authority to work the ruin of his child. And afterwards ordered that his father should be restrained from interfering with the management of his child without the consent of Lord Hawke and Mr. Adams, whom both parties allowed to be proper persons for such a purpose.

N. B. The jurisdiction of the court being questioned by the counsel for Mr. Hunter, the Lord Chancellor observed, that he knew there was such a notion; but he was of opinion that this court had arms long enough to reach such a case, and prevent a parent from prejudicing the health or future prospects of the child; and that whenever a case was brought before him he would act upon this opinion: if the House of Lords thought differently, they might control his judgment; but he certainly would not allow the child to be sacrificed to the views of the father.¹

SMART v. SMART.

1892. *Law Reports* (1892), *Appeal Cases*, 425.

In the Privy Council. On appeal from the Court of Appeal, Ontario. *Rigby*, Q. C., *Kerr*, Q. C. (of the Canadian Bar), and *Gore*, for the appellant.

[Argument omitted.]

Sir H. Davey, Q. C., *Blake*, Q. C. (of the Canadian Bar), and *G. Lawrence*, who appeared for the respondent, were not called upon to address their Lordships.

¹ As to the former distinction between the chancery jurisdiction and the common-law jurisdiction in respect to the custody of children, see Lord ESHER, M. R., and KAY, L. J., in *Reg. v. Gyngall*, L. R. (1893), 2 Q. B. 232, pp. 238-240, pp. 246-249. — Ed.

LORD HOBHOUSE. This case belongs to a class in which courts of justice have repeatedly expressed their reluctance to interfere, by reason of the great difficulty of knowing what arrangements are best for a family where the normal family arrangements have been disturbed, and yet in which interference is sometimes found necessary to prevent injury to wives or children. Their Lordships approach it with a strong sense of the delicacy of the jurisdiction, though the facts are such as to leave no material doubt of the duty which lies upon them.

The appellant and respondent are husband and wife. They were married on the 4th of June, 1874. There are three children of the marriage: a girl, born on the 10th of April, 1875; another girl, born on the 19th of July, 1877; and a boy, born on the 13th of October, 1880. Up to the year 1883 the family resided at Port Hope, a town in Ontario, where the husband practised as a solicitor and barrister.

In July, 1883, the wife left her home, taking her children with her, to take up a residence in Toronto. She had then, and has, a handsome fortune in possession, and a larger one in expectancy. The reason she assigned for leaving her husband's roof was habitual intoxication on his part, and the many distressing incidents common to such a habit.

Negotiations took place between the parties and their friends for a resumption of the family relations, and on the 2d of May, 1884, a written agreement was signed by the husband and wife, in pursuance of which the wife returned home to Port Hope.

The recitals of the agreement are as follows:—

“Whereas unhappy differences have arisen between the said David Smart and Emilie Ardelia Smart.

“And whereas the said David Smart and Emilie Ardelia Smart have been living separate and apart for some time on account of such unhappy differences.

“And whereas the said unhappy differences have arisen from the habits of intemperance of the said David Smart.

“And whereas the said David Smart has determined to abandon such habits, and in consideration of that and for the other causes and considerations in this instrument mentioned, the wife of the said David Smart, Emilie Ardelia Smart, has agreed to return and live with him the said David Smart.”

It was then agreed that the wife should advance \$8,000 to pay the husband's debts, and that she should out of her own estate maintain the household and family at Toronto; that if at any time thereafter the husband should again give way to intemperate habits, the wife should be at liberty to live apart from him, and should have the exclusive care of the children, under the obligation to maintain them; and that the husband should convey to the trustees of a previous settlement of land owned by him, other property described as the remainder of the property owned by him and adjacent to the land already conveyed.

In October, 1884, Mr. and Mrs. Smart went to California for a visit of some duration; and when there, the husband, who appears to have

kept himself sober in the meantime, relapsed into drunken habits. Arrangements were made for their return to Toronto; but when the moment arrived the husband did not appear, being in fact too drunk to travel, and the wife journeyed back to Toronto in the company of a relative. This took place in September, 1885.

The wife then instituted a suit to have the care of the children secured to her according to the agreement of May, 1884, and that led to a second agreement, which was made on the 23d of November, 1885. That agreement was stated to be supplemental to the earlier one, and it recited that, under the terms of the earlier agreement, the wife claimed the possession of her three children, and that the husband had requested her to give him a covenant as to her dealing with them. The wife thereupon covenanted to maintain and educate the children at her own expense, with provisions for their religious training and for their residence in Toronto, and for the husband's access to them.

In June, 1886, the husband applied for a writ of *habeas corpus* in respect of the three children, which the wife resisted. In the course of the proceedings it was arranged that the husband should also present a petition for the custody of the children, and that the questions in both proceedings should be tried simultaneously. A great quantity of evidence was gone into, and in the course of it the husband made some charges against his wife which had great influence on the decision of the case. It appears that in April, 1884, he had hinted at his wife's unchastity without any specific charge, and in a letter written to the wife's solicitor in June, 1886, he said that she had confessed to having married him by fraud, and for her own base purposes, and suggested that she herself was the cause of the trouble. In April and May, 1887, he entered into more detail. A medical lady, Mrs. Ballard, who had attended the wife, was then under examination, and the husband put to her several questions to show that his wife had contracted depraved habits. This he did against the protest of the wife's counsel. He insisted, too, that his drunken habits were not the only cause of her leaving him, as stated in the agreement of May, 1884, but that there were other causes. When he came under cross-examination in October, 1887, the wife's counsel insisted on knowing what he meant by his several insinuations; and he then made specific and detailed allegations, which, if true, would show that his wife was a person of abnormal depravity. In that condition the cause came on to be heard before Ferguson, J.

That learned judge found, without hesitation, as he says, that the charges so introduced had no foundation in fact, and that the wife's answer to the petition had been proved. He held that the husband had made it impossible for his wife to live with him again, and that he had been guilty of cruelty. He ordered that the writ of *habeas corpus* should be discharged with costs, and that the three children should be remanded to the custody of the wife with provisions for their education and residence, and for the husband's access to them.

The husband appealed. In his reasons for appeal, he seeks to deaden the effect of his accusations which had so recoiled upon him, by saying that he had not set them up on his application for the writ of *habeas corpus*, and that the only occasions on which he had mentioned them were privileged.

Three judges of the Court of Appeal accepted the findings of Ferguson, J., on the matters of fact in issue. They therefore held that the wife was not in fault, and that after the accusations her husband had made against her, she could not be expected to live with him again. They felt difficulty in saying that his drunken habits, which on the evidence he was shown to have abandoned, were by themselves a justification for depriving him of his children; but, having regard to his false accusations, they had no difficulty in affirming the judgment of the first court. Burton, J., who was the fourth judge, took a different view. He considered that the wife was not justified in leaving her husband on account of his drunkenness. With respect to his accusations, the learned judge thought it unnecessary to express any opinion as to their truth or falsehood; but he declined to hold that evidence given by the husband in a court of justice, especially when elicited by the wife's counsel, should be regarded as an act sufficient to warrant the Court in refusing to give the custody of his children to him. The result was that the husband's appeal was dismissed.

Their Lordships may say at once that they cannot concur in Burton, J.'s view of the husband's conduct. They cannot understand why accusations made on oath in a court of justice should, irrespectively of their truth or falsehood (as to which the learned judge does not inquire), be treated with more indulgence than accusations made elsewhere, unless the accuser is in duty bound to make them. Here the husband had no duty to make them. It is true that, if he did not, the vague and dark insinuations he had previously thrown out would be taken as groundless, and would tell against him; but that is the position in which a man places himself by throwing out insinuations which he must substantiate or withdraw. He might have withdrawn these, or he might have said that he preferred to be silent on the subject. He did prefer to support his insinuations by detailed statements which have been found to be false. Being false, the occasion on which they were made, so far from palliating his offence, aggravates it.

The law applicable to the case is the common law of England, as modified by a statute framed on the principle of what is known as Serjeant Talfourd's Act. It is thereby enacted that the court may, if it sees fit, on the petition of the mother of an infant in the custody of its father, make order for the delivery of such infant to the petitioner, to remain in her care and custody until such infant attains the age of twelve years. In this case it was the mother who had possession of the children, and the father who was seeking to get it; but the court considered, and rightly, that the result ought to be the same as if the parts were reversed.

On the 22d of June, 1886, when the writ of *habeas corpus* was sued out, all the children were under twelve years of age. On the 25th of February, 1890, when Ferguson, J.'s order was made, the two girls were more than twelve years of age. The boy has not quite attained that age at the present moment. Therefore, when the two orders below were made, the large discretion given by statute existed only in relation to the boy. The girls had to be dealt with under the common law, in which their Lordships mean to include the ordinary jurisdiction of the Court of Chancery.

Their Lordships have been very much pressed, as the courts below were, with broad judicial statements of the father's legal power over his children, and of the amount of misconduct which it requires to induce the Court of Chancery to interfere with him. Their Lordships are disposed to think that the facts of this case are such that, even if it had occurred early in this century, the court would have been induced to give the custody of the children to their mother. But they remarked during the argument, and wish to remark again, that no one has stated or can state in other than elastic terms the grounds on which the court should think fit to interfere. There must be a sufficient amount of peril to the welfare of the children. But that sufficient amount can hardly be fixed for one age by the standard of another. Drunkenness, for instance, is looked upon as a much graver social offence now than was the case two or three generations ago, and its effect upon the welfare of a family must be judged of accordingly. For many years the tendency of legislative action and of judicial decision, as well as of general opinion, has been to give to married women a higher status both as regards property and person; and, in family questions, to bring the marital duty of the husband and the welfare of the children into greater prominence; in both respects diminishing the powers accorded to the husband and the father. This change must necessarily affect the views of judges upon the welfare of families when they are called on to exercise their discretion; or, what is not a very different thing, to decide what is sufficient cause for taking children out of the custody of the father.

The *Case of Fynn*, 2 De G. & Sm. 457, before Knight Bruce, V. C., in the year 1848, was much relied on both in the courts below and at this bar. Viewed as a decision, that case cannot be said to afford any guidance. The petition presented, not under Talfourd's Act, in the names of the infant children by their grandmother as next friend, and supported by their mother, was dismissed. But the reasons of the court, as reported, leave it in doubt whether it was dismissed merely for the practical reason that the grandmother and mother had not the means of supporting the children, or because the Vice-Chancellor thought ultimately, after two adjournments, that the very strong grounds, which he stated with great force, for taking the children out of the custody of the father, were not strong enough to prevail against his legal powers, which he stated also with great force; or because the

parties, having had the serious difficulties on both sides clearly exhibited to them, were weary of the dispute. Viewing the report as an exposition of the law by a very eminent judge, their Lordships do not dissent from the terms in which the legal position of the father, apart from statute, is stated. But it seems to them that the Vice-Chancellor, while acknowledging that the effect of Talfourd's Act ought to be considered, has not stated its effect in any adequate manner.

In the next year the case of *Warde v. Ward*, 2 Ph. 786, was decided by Lord Cottenham, and it illustrates both the direct and the indirect effect of Talfourd's Act. There the wife had left home, taking her children with her, on account of her husband's misconduct. He applied to the court to have the children delivered up to him, which Shadwell, V. C., ordered to be done. There were four children, two above and two under seven years of age, which was the line drawn by Talfourd's Act. On appeal, Lord Cottenham pointed out that the court had now an absolute authority over the younger children, and a larger power over the elder than it possessed when *Wellesley v. Duke of Beaufort*, 2 Russ. 1, was decided. Afterwards he said: "Children are by nature entitled to the care of both their parents; but when the conduct of one or both of the parents has been such as to render it impossible that they can live together, and the court has therefore the painful duty cast upon it of deciding whether the children shall be brought up by one parent or the other, all that it can do is to adopt that course which seems best for the interests of the children." He then decides as to the eldest child, a girl of eleven, that she is likely to be injured by remaining with her father. As to the next, a boy of nine, Lord Cottenham thinks it unnecessary to decide whether, if that boy stood alone, he ought to be removed from his father's custody, because he says: "When I am compelled on such a ground to take one child from its father, I must not accompany that measure with the great evil and danger to the children of separating one portion of the family from the other." As to the younger ones, he repeated that "the court has an absolute control over them, without regard to the peculiar common-law right of the father to the custody of all his children." The result was, that all the children were given to their mother.

Independently of the principles explicitly laid down in this case, it shows how inevitably a change of law brings about a further change in the mind of the judge on such a subject as the welfare of families. If the court, having a discretion in the case of younger children, decides to remove them from their father, that must influence its judgment with respect to older ones, because it brings in the question whether it is right to break up the family by separating brothers and sisters.

In the *Case of Halliday*, 17 Jur. 56, decided in the year 1852, the wife petitioned under Talfourd's Act for the custody of a child four years old. The particular decision is not so important as the instructive way in which Turner, V. C., expounds the law, and which is frequently referred to. He specifies three main features as belonging

to Talfourd's Act. First, it does not destroy the father's common-law right, but assumes it, and introduces new elements and conditions under which it is to be exercised; secondly, it connects his right with his marital duty, and imposes the marital duty as the condition of recognizing the paternal right; thirdly, it regards the interest of the child. And he founded his judgment in favor of the wife on the husband's breach of marital duty.

These principles were restated by Sir George Jessel in the year 1876 in the *Case of Taylor*, 4 Ch. D. 157, and applied to the Act of 1873, which extended the power of the court to all children under sixteen.

In the *Case of Elderton*, 25 Ch. D. 220, Pearson, J., considered that there was no ground for depriving the father of his children independently of his behavior to his wife; but, as he had been guilty of a breach of marital duty, and had made it impossible for the children to have the care of both parents, the mother was intrusted with the care of them.

In the present case we have the following circumstances: The wife has twice left her husband, taking her children with her, on account of his habitual intoxication, with its disgusting incidents and degrading example. On each occasion he agreed that she should maintain and educate the children apart from him; and though those agreements are not enforceable against him by the law of Ontario, they serve to show the then opinion of himself as well as others as to the arrangements which were most fitting under the circumstances. Since the second separation he has, to all appearance, irrevocably broken up the family by falsely alleging against his wife charges so injurious that she cannot be expected ever to live with him again. And the wife has ample means to bring up and provide for the children, while the husband has only a very narrow income.

All the authorities above cited from *Warde v. Warde*, 2 Ph. 786, downwards apply to the case of the boy who was born in October, 1880, and leave no doubt that in committing him to the care of his mother the court below did what was strictly legal, as well as what was expedient for him and just between husband and wife.

As to the girls, it is true that the cases before Sir George Turner, Sir George Jessel, and Pearson, J., all related to children under the age specified by statute. But, as intimated above, it is probable that even prior to the passing of Talfourd's Act, in such a case as this, the children would not have been left in their father's care. How can there be any substantial doubt about it now? It has been shown that Talfourd's Act at once introduced a new class of considerations when some of the children are below and some above the statutory age. But besides this, the course of legislation shows distinctly a growing sense that the power formerly accorded by law to fathers of families was excessive, and that the welfare of the children required that it should be cut down. That was done here in 1839 by Talfourd's Act, which gave to the court a discretion, judicial no doubt, but still a very large

discretion, over children less than seven years old. The sense of the community was so satisfied of the benefit of the change, and also of its insufficiency, that in 1873 the limit of seven years was raised to sixteen. In Ontario it has been fixed at twelve. But it is impossible to measure by arbitrary limits of age the change of view which underlies the positive legislation. That change must also affect the question what is required for the welfare of the older children when their father's misbehaviour has made it impossible that they should have the care of both parents. A judgment on such a question always was and must be in its essence a discretionary judgment, viz., one guided by views on social and domestic matters absolutely incapable of being brought under legal rules and definitions. Doubtless it is exercised within stricter limits and under greater pressure than in cases when the legislature has in express terms given a discretion. Their Lordships are now acting under that pressure. But the welfare of a family is powerfully affected by the opinion of relatives, friends, and neighbors, which no judge has a right to disregard; and that opinion will be the opinion of the day, not of a bygone day. And whatever might have been the view taken prior to the year 1839, it is quite impossible at the present day to say that under such circumstances as are disclosed by the present case it would not be seriously prejudicial to the children to take any of them away from their mother in order to place them in the custody of their father.

The result is that the appeal fails; and their Lordships will humbly advise Her Majesty to dismiss it. The appellant must pay the costs.¹

¹ By the Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), after providing (s. 2) that on the death of the father of an infant, the mother, if surviving, shall be the guardian of such infant either alone or jointly with others; and (s. 3) that the mother of any infant may in certain cases appoint a guardian or guardians of such infant after the death of herself and the father, and otherwise; it is enacted in s. 5 as follows:—

“The court may, upon the application of the mother of any infant (who may apply without next friend), make such order as it may think fit regarding the custody of such infant and the right of access thereto of either parent, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father. . . .”

LINDLEY, L. J. “Nobody can read the various sections in the Act without seeing that it is essentially a mother's Act. It has very greatly extended the rights of mothers.” *In re A. and B. (Infants)*, L. R. (1897), 1 Chan. 786, p. 787, note 1, p. 790.—ED.

IN RE O'NEAL.

1869. 3 *Am. Law Review*, 578.

IN the Supreme Court of Massachusetts, before HOAR, J.

IN the matter of Jeremiah O'Neal, petitioner for a writ of *habeas corpus*, seeking to obtain the custody of his child.

The petitioner was married in New York in 1857, the wife having at the time one child by a former marriage. The child, whose custody is now sought by the petitioner, was born in 1859, and is now a little more than nine years of age. In the latter part of 1861 the petitioner, who is a seaman, sailed for Liverpool, and, afterwards returning to New York, went on a voyage to China. He remained abroad in the prosecution of his business until the spring of 1866. Before leaving for Liverpool, in 1861, he directed his wife to go with the children to Salem, where he had a sister residing. During the time he was abroad and separated from his wife, he, on several occasions, sent money or drafts to her, some of which she did not receive. The wife died in Salem in April or May, 1864, in a state of destitution, having, with the two children, depended largely upon charity for a considerable period for subsistence. Upon her decease, the child was placed in the Asylum for Orphans in Salem. In August, 1864, the child, with the approval of the managers and the city missionary, who supposed that she had no father living, was taken by the respondents, Samuel S. Lee and his wife, who had no children, to provide for and educate as their own. Since that time the respondents have furnished the child with a home every way suitable, and have paid every attention to her comfort and education.

The petitioner, in 1866, returned to New York, when he proceeded to Salem, and made inquiries for his wife and child, but being unable to find them there, returned to New York. He then directed his sister to make further inquiries, and sailed to California. A few months since he learned from his sister the place of residence of his child, and came on to take her. There was some evidence concerning the character and habits of the father, and his ability to support the child. It also appeared that he intends to reside in California, and proposes to place the child in the care of a married sister in California.

Upon these facts it was contended, in behalf of the petitioner, that, being father, he had a right to the custody of the child; that in determining such right the discretion of the court might be exercised, but it must be a judicial discretion. There are only two cases in which the right of the father is limited, which are when he is manifestly unfit to take charge of the child, and when he has abandoned by his acts his right to the custody of the child. Upon the facts of the case the father was a fit person to care for the child, and had not abandoned his right.

S. B. Ives, Jr., and *J. H. Ellis*, for petitioner.

W. D. Northend, for respondents.

Judge HOAR, after consulting with other members of the court, said that he was prepared, after conference, to state the result he had reached, in which all the members of the court concurred. The decision would depend upon the application of a legal proposition to the facts of the case. He need not say that he had hardly ever had occasion to pass upon a more painful case, — one in which he was more moved by sympathy for both the parties. The father has *prima facie* the right to the custody of the child. This right cannot be taken from him by the mere consideration of any supposed benefit which would accrue to the child, unless something has occurred to interfere with that right. Suppose that a child in humble circumstances is found in the street going to school, and a very wealthy person undertakes to adopt it; although the court might be of opinion that it would be for the best interests of the child, yet the court has no power to allow it. It is a question of natural, legal right. The court has in such cases only a judicial discretion.

He would next look at the facts of the case to see if anything was proved to qualify the rights of the parties. Although there was some evidence to show that the petitioner did, in one or two instances, strike his wife, yet he did not think, considering their station in life and habits, that there was anything to show that he was an unfit person to have the custody of the child. The affectionate terms in which his wife afterwards wrote him showed also that their domestic harmony was not interrupted.

He did not think that the absence of the petitioner on a voyage to China, and in remaining abroad, showed any failure of duty on his part, or any intention to abandon his wife and family. On his return, although he did not stay long, he made what he supposed to be sufficient inquiries for them. No conclusion is to be drawn against him for any misconduct on his part. As between the father and the respondent and his wife, the case is to be decided on the ground of superior right, and the right of the father is first to be considered. If he has done nothing to forfeit his right, as between the two, his right is the stronger. The learned judge then continued: —

“There remains the question as to the condition of the child itself. In a decision of the case, it must be considered how the father’s right is affected by the condition of the child. Suppose by a pure misfortune, as insanity, or being cast away and being compelled to live among savages, a father has left his child destitute and dependent upon charity, does that give the child the right to form such new relations as to take from the father the right to the custody of the child? Upon the best reflection, I am satisfied that it does. When the father, by misfortune, is compelled to leave the child utterly helpless, the child ought to be considered as emancipated by the father. If by misfortune the child has made new relations in life so deep and strong as to change its whole nature and character, the father has no right to reclaim it. I am satisfied that this is a sound proposition. The child is not the

father's property. It is a human being, and has rights of its own. The father has a right to the custody of the child because, from general experience, the natural and trained affections of the child attach to the father and those of the father to the child. If the father has left the child at an age too early for it to remember him, and it is placed in circumstances so that it must perish unless cared for, and other persons have expended money and become attached to the child, and the child has formed such associations as cannot be severed without injury to it, then the father has no legal right to sunder those ties. He is not to be separated from his child. His acquaintance is yet to be formed. It being proved that the father left the child, and by misfortune or accident failed to discover where the child was, and in the mean time that the child has been taken care of by the respondents until she has arrived to years of discretion, and that it is intended to remove her to a distant State, where the mode of life will be different from that to which she has been accustomed, the law will not allow the father to have the custody of the child. It is within the judicial duty of the court to determine that the assent of the father has been given to the arrangement, which cannot be terminated without injury to the child. This principle would apply under the same circumstances if a father became insane. A human being cannot be treated like a piece of property. So, if a child by a misfortune were nurtured in a warm climate, if it appeared that by a sudden removal to another climate its health would be injured, this right of the father would not exist. The father, in this case, should be glad that his child had fallen among people who have been so good to her, and that she has been made a little girl that he may be proud of. It would be cruel in him to take her away, depriving her of the society of her sister, her only relation, and putting her among those who in all things are strangers to her except that of blood. The child cannot now appreciate the strong tie of blood, but this may be developed if the father takes pains to form her acquaintance. There is no absolute forfeiture of the father's rights; but the child having been left under such circumstances, in the care of others, he cannot now withdraw the child from their custody. It being understood that there will be no attempt on the part of the respondents to deprive the father of the opportunity of cultivating the acquaintance of the child, the order is that the child be remanded to the custody of the respondents."

Upon inquiry made by counsel for the petitioner, with a view to ascertain whether the case should be carried to the full court, Judge HOAR said that the case had been carefully considered by himself; that he had submitted it to two members of the court, who had also considered it; and that he had now submitted it with a statement of the legal proposition upon which the decision rests to the five members of the court, all of whom concurred with him in the decision which he had rendered.

CHAPSKY v. WOOD AND WIFE.

1881. 26 *Kansas*, 650.PETITION for a writ of *habeas corpus*.*Howell Jones, J. D. McFarland, John Martin, and J. D. S. Cook,*
for petitioner.*George R. Peck, and L. C. Slavens,* for respondents.

BREWER, J. In this case of the petition of Morris A. Chapsky for the possession of his minor child, counsel have in their arguments expressed very feelingly and truthfully the embarrassments and difficulties which surround the decision of a case like this. These arise, not because there is a conflicting question of fact to be settled by the court, for that is a matter of every-day occurrence in judicial proceedings; it is not that it is a question between a grown man on one side and a grown woman on the other, for we could dispose of every question affecting simply them, without any embarrassment or hesitation. The burden of the case is, that the decision is one which involves the future welfare of a little girl; and I think no man can look upon the face of a bright and happy little girl, like the one before us, and come to a decision of a question which may make or mar her future life, without hesitation and feeling: certainly we are not so insensible as to be able to do it.

The questions of law which are involved in a case like this are few in number, and, I think, not subject to much doubt. They may be summed up briefly thus: The father is the natural guardian and is *prima facie* entitled to the custody of his minor child. This right springs from two sources: one is, that he who brings a child, a helpless being, into life, ought to take care of that child until it is able to take care of itself; and because of this obligation to take care of and support this helpless being arises a reciprocal right to the custody and care of the offspring whom he must support; and the other reason is, that it is a law of nature that the affection which springs from such a relation as that is stronger and more potent than any which springs from any other human relation.

The second proposition of law is, that a child is not in any sense like a horse or any other chattel, subject-matter for absolute and irrevocable gift or contract. The father cannot, by merely giving away his child, release himself from the obligation to support it, nor be deprived of the right to its custody. In this it differs from the gift of any article which is only property. If to-day Morris Chapsky should give a horse to another party, that gift is for all time irrevocable, and the property never can be reclaimed; but he cannot by simply giving away his child relieve himself from the obligation to support that child, nor deprive himself of the right to its custody.

I might say here, that the statute has provided for a relinquishment

through probate court proceedings, which may be considered (but that is outside this case) irrevocable.

The third proposition is, that a parent's right to the custody of a child is not like the right of property, an absolute and uncontrollable right. If it were, it would end this case and relieve us from all future difficulties. A mere right of property may be asserted by any man, no matter how bad, immoral, or unworthy he may be ; but no case can be found in which the courts have given to the father who was a drunkard or a man of gross immoralities, the custody of a minor child, especially when that child is a girl. The fact that in such cases the courts have always refused the father the custody of his child, shows that he has not an absolute and uncontrollable right thereto.

The fourth proposition is, that though the gift of the child be revocable, yet when the gift has been once made and the child has been left for years in the care and custody of others, who have discharged all the obligations of support and care which naturally rest upon the parent, then, whether the courts will enforce the father's right to the custody of the child, will depend mainly upon the question whether such custody will promote the welfare and interest of such child. This distinction must be recognized. If, immediately after the gift, reclamation is sought, and the father is not what may be called an unfit person by reason of immorality, &c., the courts will pay little attention to any mere speculation as to the probability of benefit to the child by leaving or returning it. In other words, they will consider that the law of nature, which declares the strength of a father's love, is more to be considered than any mere speculation whatever as to the advantages which possible wealth and social position might otherwise bestow. But, on the other hand, when reclamation is not sought until a lapse of years, when new ties have been formed and a certain current given to the child's life and thought, much attention should be paid to the probabilities of a benefit to the child from the change. It is an obvious fact, that ties of blood weaken, and ties of companionship strengthen, by lapse of time ; and the prosperity and welfare of the child depend on the number and strength of these ties, as well as on the ability to do all which the promptings of these ties compel.

The fifth proposition is, that in questions of this kind three interests should be considered : The right of the father must be considered ; the right of the one who has filled the parental place for years should be considered. Perhaps it may not be technically correct to speak of that as a right ; and yet, they who have for years filled the place of the parent, have discharged all the obligations of care and support, and especially when they have discharged these duties during those years of infancy when the burden is especially heavy, when the labor and care are of a kind whose value cannot be expressed in money — when all these labors have been performed and the child has bloomed into bright and happy girlhood, it is but fair and proper that their previous faithfulness, and the interest and affection which these labors have

created in them, should be respected. Above all things, the paramount consideration is, what will promote the welfare of the child? These, I think, are about all the rules of law applicable to a case of this kind.

Now, passing to the facts, which I shall only outline: Morris A. Chapsky married the mother of this child ten years ago. The marriage was not acceptable to his parents, though for no reason that we are advised of, involving the character of any of the parties. Returning home immediately after his marriage, the father, commenting upon the fact of the marriage, which had been made without his consent, was not satisfied, and bade him start out for himself. Some criticism has been placed upon this conduct, which, we think, is not deserved. It is often best for a young man that he should be turned out upon his own resources and compelled to struggle for himself; and that his father was not destitute of affection for his child, is patent, from the fact that he made him a gift of money largely in excess of that which most young men have to start with. Whether his judgment was good, or otherwise, cuts no figure in this case. He started out with this money, and wandered around, as a young man is apt to do, and, drifting from place to place, finally came penniless to Kansas City. He struggled for a series of years under pecuniary embarrassment; and during these years this child was born. His wife's health was delicate, and she was obviously unable to discharge ordinary household duties, even without the care of this child; and the respondent, Mrs. Wood, her sister, kindly provided for her during her confinement, and took care of the child. The child was left with her (Mrs. Wood), and from that day to this, a period of about five and one-half years, has been all the time in her custody. During the very early infancy of the child, the question arose as to her custody — Mrs. Wood insisting that the mother should take the child, or that it should be given to her. It is clear that this matter of discussion between the parties lasted for some time, and we are satisfied from the testimony that in fact a gift was made of the child by both mother and father, to Mrs. Wood. The mother's letters exhibit this; and while the father does not recollect of having made such gift, we are convinced that he did so, and by parol agreement relinquished to the respondents his parental rights. No writing passed between them; but regarding as we do that a gift is not decisive in the case, unless made in accordance with the statutory form, the want of a writing cuts no figure now. The child was given to Mrs. Wood, and has been in her care for five years and a half — from the date of its birth to the present day. What the future of the child will be, is a question of probability. No one is wise enough to forecast, or determine absolutely, what or what would not be best for it; yet we have to act upon these probabilities from the testimony before us, guided by the ordinary laws of human experience. Involved in the question as to what will promote the welfare of the child, are questions of wealth; questions of social position, questions of health, questions of educational advantages,

moral training — of all things, in short, which will tend to develop a little girl into a perfect woman.

And first, we remark that the child has had, and enjoys to-day, good advantages, and its welfare has been promoted, and is promoted to-day. No one has said that this child has lacked anything which a child should have, and the testimony all shows that it has been cared for most patiently and faithfully — as well as it could have been cared for by any one; and to that care the face and appearance of the child abundantly testify. This fact does not rest on probabilities. It is a serious question, always to be considered, whether a change should be advised. "Let well enough alone," is an axiom founded on abundant experience. There is nothing in the present situation of the respondents, their pecuniary condition, the business capacity of the husband, their social position, their affection for this child — absolutely nothing which tends in any way to suggest that the welfare of the child which has been promoted in the past, would be limited or abridged in the future. What they have done for the child tends to show what they will do through the future years of its girlhood. What that has been is certainly as much, and I think more, than the average child receives.

Again, while there is more wealth on the side of the father, and pecuniary advantages are held out for her future — greater than those, perhaps, which the respondents can present — yet we cannot be insensible to the surroundings under which the child would be placed if committed to its father. The grandfather has been on the stand before us, and not merely from the testimony adduced from his relatives and neighbors, but from his appearance and manner on the stand, evidently he is a gentleman of character and responsibility, not destitute of affection, and one who has provided a comfortable home and is in a position to give to the child all these advantages. Yet the child if it goes, goes to the care of its father; and while there is no testimony showing that the father is what might be called an unfit person, that his life has not been a moral one, yet we can but think that it is developed, both by testimony and his manner and appearance on the stand, that there is a coldness, a lack of energy, and a shiftlessness of disposition, which would not make his personal guardianship of the child the most likely to ripen and develop her character fully. He seems to us like a man still and cold, and a warm-hearted child would shrink and wither under care of such a nature, rather than ripen and develop. These are facts that we can but notice, and they have in them no imputation against the father of an unkind nature or immoral life; but the facts as they impress us are, that the child would not really grow to its fullest promise under the care of such a man.

Again, and lastly, the child has had, and has to-day, all that a mother's love and care can give. The affection which a mother may have and does have, springing from the fact that a child is her offspring, is an affection which perhaps no other one can really possess; but so far as it is possible, springing from years of patient care of a

little, helpless babe, from association, and as an outgrowth from those little cares and motherly attentions bestowed upon it, an affection for the child is seen in Mrs. Wood that can be found nowhere else. And it is apparent, that so far as a mother's love can be equalled, its foster-mother has that love, and will continue to have it.

On the other hand, if she goes to the house of her father's family, the female inmates are an aunt, just ripening into womanhood, and a grandmother; they have never seen the child; they have no affection for it springing from years of companionship. While she is a child of perhaps a favorite son or brother, she is also the child of a disowned or repudiated daughter-in-law and sister-in-law, and the appeal which the child will make naturally — and the child is one to make a strong appeal to any one — will always be shadowed and clouded by the fact that she comes from one who was not a favorite in that family.

Human impulses are such that doubtless they would form an affection for the child — it is hardly possible to believe otherwise; but to that deep, strong, patient love which springs from either motherhood, or from a patient care during years of helpless babyhood, they will be strangers.

They cannot have this; and to my mind, I am frank to say, this last is the controlling consideration. And these three considerations are those which compel us to say that we cannot believe it wise or prudent to take this child away from its present home, where it has been looked upon as an own child; and if we should see a child of ours in the same circumstances, we cannot believe that we should deem it wise or prudent to advise a change, notwithstanding the pecuniary advantages that might seem to be offered to it.

The judgment of the court therefore is, that the child will be remanded to the respondents; and the petition is dismissed, at the cost of the petitioner.

All the justices concurring.

FARNHAM v. PIERCE.

1886. 141 *Massachusetts*, 203.

W. ALLEN, J. The father of an infant four years of age, who has been committed to the custody of the overseers of the poor of the city of Taunton by the First District Court of Bristol, on findings that she was, by the neglect of her parent, growing up without education or salutary control, and in circumstances exposing her to lead an idle and dissolute life, and that she had a settlement in Taunton, seeks her discharge from custody, on a writ of *habeas corpus*, on the ground that the St. of 1882, c. 181, § 3, under which the court acted, is contrary to article 12 of the Declaration of Rights of this State.

The section of the statute is as follows: "Whenever it shall be made to appear to any court or magistrate that within his jurisdiction any child under fourteen years of age, by reason of orphanage, or of the neglect, crime, drunkenness, or other vice of his parents, is growing up without education or salutary control, and in circumstances exposing him to lead an idle and dissolute life, or is dependent upon public charity, such court or magistrate shall, after notice to the State board of health, lunacy, and charity, commit such child, if he has no known settlement in this Commonwealth, to the custody of said board, and if he has a known settlement, then to the overseers of the poor of the city or town in which he has such settlement, except in the city of Boston, and if he has a settlement in said city, then to the directors of public institutions of said city until he arrives at the age of twenty-one years, or for any less time; and the said board, overseers, and directors are authorized to make all needful arrangements for the care and maintenance of children so committed in some State, municipal, or town institution, or in some respectable family, and to discharge such children from their custody whenever the object of their commitment has been accomplished."

This is not a penal statute, and the commitment to the public officers is not in the nature of punishment. It is a provision by the Commonwealth, as *parens patrie*, for the custody and care of neglected children, and is intended only to supply to them the parental custody which they have lost. In this respect, the statute manifestly differs from the construction given to the statutes under which *People v. Turner*, 55 Ill. 280, and *State v. Ray*, New Hampshire, July, 1885, were decided, and resembles more the statutes considered in *Milwaukee Industrial School v. Supervisors*, 40 Wis. 328; *Ferrier's Petition*, 103 Ill. 367; *McLean County v. Humphreys*, 104 Ill. 378; *Prescott v. State*, 19 Ohio St. 184; *House of Refuge v. Ryan*, 37 Ohio St. 197; *Ex parte Crouse*, 4 Whart. 9; and *Roth v. House of Refuge*, 31 Md. 329. It does not punish the infant by confinement, nor deprive him of his liberty: it only recognizes and regulates, as in providing for guardianship and apprenticeship, the parental custody which is an incident of infancy.

It is argued that the right of the father to the society, education, and earnings of his child is taken from him by a summary proceeding, without notice or trial. If the statute is to be construed as authorizing a final adjudication upon the rights of the father, taking from him the custody and care of his child, it would be a grave question whether it could be sustained. But we do not so construe the statute.

It provides custody for a child who is suffering for the need of it in consequence of the death or unfitness of its parent. The fact of the death, or neglect, or crime, or vice of the parent, shows the condition of the child, — that he is in need of parental custody. The fact that he is suffering morally for want of parental restraint calls for immediate and appropriate relief, as would the want of food or shelter. The inability or failure of the parent to furnish the relief is intended to show

the need of the child, not to be the basis of a decree against the parent. *Milwaukee Industrial School v. Supervisors, ubi supra.*

It is argued that the statute authorizes the commitment of the child to custody until his majority, and only gives the board to which he is committed discretionary authority to discharge him; and that it thus wholly deprives the parent of the right to the custody. The answer is, that the father is not bound by the adjudication, and his rights are not affected by it, except incidentally, and to a limited extent, necessary for the good of the child.

It would be an entirely natural and proper provision, in a commitment intended to bind the child and strangers only, that it should be during minority, or for a shorter time, in the discretion of the committing magistrate; and it is not necessary to infer from such a provision an intention that the rights of the father should be adjudicated and determined which would not have been found without it. That that was not the intention of the Legislature appears from various considerations besides those already referred to. The proceeding is intended to be summary. Any magistrate is authorized to act when it shall be made to appear to him, &c. No complaint or written application to the magistrate is required, and no notice to any one except to the State board of health, lunacy, and charity, after it shall have been "made to appear." No trial is required, and it might be "made to appear" by inspection of the child and his surroundings, without any other proceeding. The statute not only requires no notice to the parent, but does not make him a party, and gives him no right to be heard, even if present; and it does not prescribe a fact as constituting the unfitness of the parent, — as support as a pauper, or sentence to the State prison, for instance, — but leaves the question of unfitness, in the respects specified, to the summary determination of any magistrate, without revision or appeal. As a proceeding to ascertain whether a child, who is growing up without salutary control, and exposed to vicious habits, is in that condition, in spite of proper parental control or for want of it, with a view of supplying the control, if needed, the meaning of the statute is plain, and in the line of legislative precedent; as a proceeding to determine the fact of the father's unfitness and consequent forfeiture of his parental rights, and to adjudicate upon his right to the custody of his child, it lacks essential features which we are accustomed to find in all legislation affecting rights of property or of persons; and we do not think that the necessity of construction requires us to give that meaning to the language of the statute.

The finding of the District Court must be taken to be that the child was in the condition which required the custody of the overseers of the poor according to the statute, and she was given into their custody for that reason, and not because the father was adjudged to have forfeited his right. The commitment is valid, and the custody in which the child is held is lawful, and subject to the rights of the father. The statute does not provide any way in which the father can maintain his rights.

He can apply to the overseers of the poor to discharge the child, for the reason that the object of the commitment has been accomplished, and, on showing his ability and fitness to take charge of the child, she should be discharged by them. The statute leaves that in their discretion, it is true, and as to matters other than the right of the parent, their discretion may be absolute; but the rights of the parent can be protected on *habeas corpus* by this court. *Milwaukee Industrial School v. Supervisors*, and *House of Refuge v. Ryan*, *ubi supra*.

We think that the commitment is evidence of the condition of the child, as in need of restraint on account of the neglect of the parent, at the time of the commitment; but that it is not binding upon the father as an adjudication upon his rights, and that he has a right to show that the cause stated for the commitment does not now exist, that he is competent and fit to have the care of his child, and that the welfare of the child will permit of her removal from her present custody. The case should be remitted for further hearing before a single judge.

Ordered accordingly.

G. E. Williams, for the petitioner.

F. V. Fuller, for the respondents.

CHAPTER II.

OBLIGATION OF PARENT TO SUPPORT CHILD, AND
VICE VERSA.

SHELTON v. SPRINGETT.

1851. 11 *Common Bench*, 452.

ASSUMPSIT for meat, drink, washing, lodging, and other necessities found and provided by the plaintiff for the defendant's son.

Plea, *non assumpsit*.

At the trial at the sheriff's court, London, on the 29th of May last, it appeared that the plaintiff kept a coffee-house in the Minories; that the defendant, who was the manager of the Tenterden branch of the London and County Joint-Stock Bank, in April, 1850, sent his son, a youth of the age of twenty years, to London to look out for a ship, giving him £5, and telling him to put up at a hotel called Burrell's Hotel, at which he himself was in the habit of putting up when he came to town; that, after staying at Burrell's Hotel for a week at an expense of £3 9s. (which sum he procured from a friend of his father's), the defendant's son went to the plaintiff's coffee-house and remained there fifteen weeks.

The son, who was called as a witness, stated that he went to the plaintiff's house without his father's knowledge; that he was recommended by some to go there, as it would be more economical, and nearer to the docks than the house to which his father had desired him to go; that he had addressed two or three letters to his father, but had received no reply; that he could not say how he had spent the £5 which his father had given him, but no part of it in board and lodging.

Some correspondence was then put in, but it contained nothing from which a contract or promise on the part of the defendant to pay for his son's board and lodging could be implied.

For the defendant it was submitted, on the authority of *Mortimore v. Wright*, 6 M. & W. 482, that the moral obligation which a father is under to provide for his child imposes on him no liability to pay the debts incurred by the child; and that he is not so liable, unless he has given the child authority to incur them, or has contracted to pay them; and, consequently, that here there was no case to go to the jury.

On the other hand, reliance was placed upon *Baker v. Keen*, 2 Stark. N. P. C. 501, where it was held that where a minor orders articles which are necessary and suitable to his situation in life, it is a question for the jury, under all the circumstances of the case, whether they can infer an authority given by the father to the son so to contract.

The under-sheriff, reserving to the defendant leave to move to enter a nonsuit, left the case to the jury, telling them that it was incumbent on the plaintiff to show that the defendant had given authority to the son to pledge the defendant's credit, and that the board and lodging had been supplied on the credit of the defendant.

The jury returned a verdict for the plaintiff, damages £15 15s.

Needham, on a former day in this term, obtained a rule *nisi* to enter a nonsuit on the ground urged at the trial.

Byles, Serjt., and *Charnock* now showed cause. There was some evidence to go to the jury. *Law v. Wilkin*, 6 Ad. & E. 718, 1 N. & P. 697, W. W. & D. 235, which, it is conceded, cannot now be supported to the full extent, shows that very slight evidence will suffice to fix the parent in such a case. [JERVIS, C. J. If that case be any authority, you might almost say that a total absence of evidence will do. And the same may be said of *Baker v. Keen*.] *Blackburn v. Mackey*, 1 C. & P. 1, is also an authority to show that almost any evidence will warrant a jury in implying that the infant's contract is sanctioned by the father, whose moral duty it is to supply his child with necessaries. The only evidence in that case was a passage in a letter written by the father after the debt was contracted, in which he says: "I have no great objection to paying your first bill, if you will send a friend with a receipt." [MAULE, J. It must, I think, have been clear to any one but the jury in that case that the father was repudiating his liability with the utmost indignation.] No doubt the doctrine laid down by Lord Abinger, in *Mortimore v. Wright*, that, "if a father does any specific act, from which it may reasonably be inferred that he has authorized his son to contract a debt, he may be liable in respect of the debt so contracted; but the mere moral obligation on the father to maintain his child affords no inference of a legal promise to pay his debts; and we ought not to put upon his acts an interpretation which, abstractedly, and without reference to that moral obligation, they will not reasonably warrant," is law at this day; but the question still is whether there was not in this case reasonably sufficient evidence to warrant the jury in inferring a contract on the defendant's part to be answerable for necessaries supplied to a son whom he had thrown upon the world in the manner here shown.

Needham, *contra*, was not called upon by the court.

JERVIS, C. J. I am of opinion that this rule must be made absolute. It is well settled that a father is not, without some contract, express or implied, liable for necessaries supplied to his son. Lord Abinger, in *Mortimore v. Wright*, says: "In point of law, a father who gives no authority, and enters into no contract, is no more liable for goods sup-

plied to his son than a brother, or an uncle, or a mere stranger would be. From the moral obligation a parent is under to provide for his children, a jury are, not unnaturally, disposed to infer against him an admission of a liability in respect of claims upon his son on grounds which warrant no such inference in point of law." To that doctrine I entirely subscribe. If a father turns his son upon the world, the son's only resource, in the absence of anything to show a contract on the father's part, is to apply to the parish, and then the proper steps will be taken to enforce the performance of the parent's legal duty. The simple question, therefore, in this case, is whether there was any evidence whatever of authority to charge the defendant. The evidence is that the father starts his son for London in search of a ship, with £5 in his pocket, and advises him to go to one hotel, and the son goes to another. There really was no evidence to go to the jury; that is, no reasonable evidence which ought to have been submitted to the judgment of the jury.

MAULE, J. I am of the same opinion. People are very apt to imagine that a son stands in this respect upon the same footing as a wife. But that is not so. If it be asked, is then the son to be left to starve, the answer is, he must apply to the parish, and they will compel the father, if of ability, to pay for his son's support. That is the course which the law points out. But the law does not authorize a son to bind his father by his contracts. Upon the evidence in this case, it is clear there was a total absence of authority in the son to contract on the part of the father the debt now sued for. The plaintiff originally contracted with the son, intending to trust to him for payment. There is nothing in the correspondence from which we can infer an intention on the father's part to confer authority upon the son to contract a liability for him. The letter written by the defendant's attorney does not admit, or give any color of admission, of an original liability. I think there is not even what is called a *scintilla* of evidence. But it is quite clear that there is not such evidence as would justify a jury in finding a verdict for the plaintiff. I therefore agree with my Lord that the rule must be made absolute to enter a nonsuit.

CRESSWELL, J. I am entirely of the same opinion. The undersheriff ought to have nonsuited the plaintiff, or told the jury that there was no evidence to warrant them in finding for him.

TALFOURD, J., concurred.

Rule absolute

PORTER v. POWELL.

1890. 79 Iowa, 151.

APPEAL from Dallas District Court. Hon. O. B. AYRES, Judge.

The District Court certifies to this court the following question, upon which it is desirable to have the opinion of the Supreme Court: "Is a father legally liable to a physician for the latter's services in professionally treating the minor daughter of said father, dangerously attacked with typhoid fever, who, at the date of said treatment, was seventeen years of age, and was then, and had been, residing away from her father's house for three years prior to the rendition of said services, earning and controlling her own wages, and providing herself with clothing, at a place thirty miles distant from her father's place of residence, the father not furnishing, or agreeing with his daughter to furnish, her with any money or means of support, but consenting to her absence from home; the said professional services being rendered at the request of the said minor daughter, but were rendered and furnished without the procurement, knowledge, or consent of the defendant, and without knowledge of the sickness, until demand was made for payment of said services by plaintiff, the attendance of plaintiff being from day to day for a period of twenty-one days?" Judgment for plaintiff. Defendant appeals.

W. W. Cardell and R. S. Barr, for appellant.

Parsons & Perry and D. W. Wooden, for appellee.

GIVEN, J. I. Appellant's contention is that the obligation of parents to support their minor children is only a moral one, and is not enforceable in the absence of statute or promise; that such promise is not to be implied from mere moral obligation, nor from the statute providing for the reimbursement of the public; and that an omission of duty, from which a jury may find a promise by implication of law, must be a legal duty, capable of enforcement by process of law. At first glance, this view of the law seems opposed to our natural sense of justice; yet it is not without support in the authorities. Such is held to be the law in New Hampshire and Vermont. See *Kelley v. Davis*, 49 N. H. 187; *Farmington v. Jones*, 36 N. H. 271; *Gordon v. Potter*, 17 Vt. 348. A different doctrine has long since been held in this State. In *Dawson v. Dawson*, 12 Iowa, 513, this court held that "the duty of the parent to maintain his offspring until they attain the age of maturity is a perfect common-law duty." In *Johnson v. Barnes*, 69 Iowa, 641, which was an action by the mother, who had been divorced, against the father, for support furnished their children, the court says: "As there was no promise, the question to be determined is whether one can be inferred in favor of a wife, who supports her child, as against her husband, who has without cause abandoned her and his child. The obligation of parents to support their children at common

law is somewhat uncertain, ill defined, and doubtful. Indeed, it has been said that there is no such obligation. . . . But we are not prepared to say that this rule has been adopted in this country, and it should be conceded, we think, that, independent of any statute, parents are bound to contribute to the support of their minor children, and that such obligation rests mainly on the father, in the absence of a statute, if of sufficient ability; and that, in favor of a third person who supports a child, a promise to pay may and should be inferred on the ground of the legal duty imposed." In *Van Valkinburgh v. Watson*, 13 Johns. 480, it is said: "A parent is under a natural obligation to furnish necessities for his infant children; and, if the parent neglect that duty, any other person who supplies such necessities is deemed to have conferred a benefit on the delinquent parent, for which the law raises an implied promise to pay on the part of the parent." In 5 Wait. Act. and Def. 50, the author says: "The duty of parents to support, protect, and educate their offspring is founded upon the nature of the connection between them. It is not only a moral obligation, but it is one which is recognized and enforced by law. . . . In order to hold the person liable in any case for goods furnished, either actual authority for the purchase must be shown, or circumstances from which such authority may be implied. . . . The legal obligation of parents in respect to support extends only to those things which are necessary; and if a parent refuses or neglects to provide such things for his child, and they are supplied by a stranger, the law will imply a promise on the part of the parent to pay for them." Without further citation of authorities, we announce as our conclusions that it is the legal as well as moral duty of parents to furnish necessary support to their children during minority; that a parent cannot be charged for necessities furnished by a stranger for his minor child, except upon an express or implied promise to pay for the same; and that such promise may be inferred on the grounds of the legal duty imposed.

II. It is further contended on behalf of appellant that the facts certified show an emancipation of his daughter, such as to relieve him from liability for the services sued for; that support and services are reciprocal duties, and if one is withheld the other may be withdrawn.

[The Court held that "there was no such an emancipation as exempted the father from liability for actual necessities furnished to his daughter."]

Judgment of District Court affirmed.

[The dissenting opinion of BECK, J., is omitted.]

VAN VALKINBURGH v. WATSON.

1816. 13 *Johnson* (New York), 480.

IN error, on *certiorari*, to a justice's court.

The defendants in error brought an action in the court below against the plaintiff in error for necessities furnished by them to his infant son. On the trial it appeared that the son of the defendant below came to the store of the plaintiffs below and purchased a coat for himself; but there was no evidence that it was done with his father's consent. The defendant proved that his son lived in his family, and was comfortably and decently clothed, according to his circumstances. A verdict and judgment were given for the plaintiffs in the court below.

PER CURIAM. A parent is under a natural obligation to furnish necessities for his infant children; and if the parent neglect that duty, any other person who supplies such necessities is deemed to have conferred a benefit on the delinquent parent, for which the law raises an implied promise to pay on the part of the parent. But what is actually necessary will depend on the precise situation of the infant, and which the party giving the credit must be acquainted with, at his peril. *Simpson v. Robertson*, 1 Esp. Rep. 17; *Ford v. Fothergill*, Id. 211. In the case of *Bainbridge v. Pickering* (2 Wm. Black. Rep. 1325), Gould, J., says, with great propriety: "No man shall take upon him to dictate to a parent what clothing the child shall wear, at what time they shall be purchased, or of whom; all that must be left to the discretion of the father or mother." Where the infant is *sub potestate parentis*, there must be a clear and palpable omission of duty in that respect, on the part of the parent, in order to authorize any other person to act for, and charge the expense to, the parent. In this case, there is no ground to charge the father with any neglect of duty in providing necessities for his child, and the judgment must be reversed.

Judgment reversed.

HUKE v. HUKÉ.

1891. 44 *Missouri Appeals*, 308.¹

ERROR to St. Louis Circuit Court. Hon. DANIEL D. FISHER, Judge.

Petition by daughter, seventeen years of age, by her next friend, against her father for maintenance. The petition is, in substance, as follows : —

The petitioner's father, by commands and threats, compelled her to leave home without means of support. The father has continuously since neglected and refused to perform any of his duties as parent, or to make any provision for the petitioner's support and education. The father is a man of property and of large income, well able to make provision for his daughter. The petitioner is wholly destitute, and unable to secure employment, or to earn the means of subsistence. For her relief she has incurred debts beyond her capacity to pay, and her credit is now exhausted. She prays the court, after notice to the father and a hearing, to order the father to furnish from time to time the necessary funds and means for supplying the petitioner's wants during the remainder of her minority ; and that the court may, for the accomplishment of such purposes, appoint a suitable person to act, under the direction of the court, in receiving such funds and means from the father, and applying them for the benefit of the petitioner.

The Circuit Court sustained a demurrer to the petition.

Frank M. Estes and Willis H. Clark, for plaintiff in error.

Rassieur & Schnurmacher, for defendant in error.

THOMPSON, J. [After stating the case.] This action proceeds in the face of elementary principles. By the common law of England a father is not bound to support his infant child in the sense that the obligation has any legal sanction ; no action can be maintained against him, without the aid of statute, to compel him to discharge this natural duty. By that law a father is not liable, as upon an implied contract, to a stranger who furnishes necessaries for the support of his infant child. *Urmston v. Newcomen*, 4 Ad. & El. 899 ; *Mortimore v. Wright*, 6 Mees. & W. 482 ; *Seaborne v. Maddy*, 9 Car. & P. 497 ; *Hodges v. Hodges*, Peake Ad. Cas. 79. On this point many of the American courts follow the English rule, but some of them have departed from it and adopted the more humane principle, that the moral obligation of the father to support his infant child is sufficient to raise an implied promise to pay for necessaries furnished to a child by a stranger. See, for instance, *Gotts v. Clark*, 78 Ill. 229 ; *Hunt v. Thompson*, 3 Scam. (Ill.) 179. I have looked through our Missouri cases without satisfying myself what the state of our law is on this question of the father's liability for necessaries. But the intimations of those cases are such that we may concede that, under our law, a father is liable to a stranger

¹ Statement condensed from opinion. Argument omitted. — ED.

for necessities furnished to his infant child. *Rogers v. Turner*, 59 Mo. 116; *St. Ferdinand Academy v. Bobb*, 52 Mo. 357; *Girls' Home v. Fritchey*, 10 Mo. App. 344. And yet it does not follow that such an action as the present will lie.

No instance is found in the books where such an action as the present has been maintained either at law or in equity. At one period in our English history a statute was enacted that, if any Popish parent should refuse to allow his Protestant child a fitting maintenance, with a view to compel him to change his religion, the Lord Chancellor should, by order of the court, constrain him to do what is just and reasonable. Stat. 11 & 12 W. III. ch. 4. The very enactment of this statute — the necessity in the state of the law for such a statute — shows that a father was under no compulsory obligation at common law, or by the principles of equity, to support his infant child. A case arose after the passing of this statute, making this conclusion still more clear. The daughter of a wealthy Jew had embraced Christianity, and he turned her out of doors. On the petition of the parish for relief against him, they were held entitled to none, because it was not alleged that she was poor or likely to become chargeable. 1 Ld. Raym. 699. This gave occasion for another statute, which ordained that if Jewish parents should refuse to allow their Protestant children a fitting maintenance, suitable to the fortune of the parents, the Lord Chancellor, on complaint, might make such order as he should see proper. Stat. 1 Anne, ch. 30; 1 Bla. Com. 449.

But it is suggested, in argument, that this petition is addressed to the chancery powers of the Circuit Court, and that the Chancellor of England had, in virtue of a delegated authority from the king as *parens patriæ*, or, as was sometimes said, the father of the fatherless, a power to require a father, having the means, to set apart a fund for the support of his indigent minor child. That court has again and again asserted a species of vice-regal power over the custody and education of children, in virtue of a delegated authority from the king as *parens patriæ*. But the extent to which the court has gone in the exercise of this power has been to make orders disposing of the custody of infant children, and directing a scheme of education out of their own property, when they had property out of which such a scheme could be directed. At one time there was considerable opinion to the effect that the jurisdiction of chancery in this regard rested upon property; and, therefore, it was a common practice for some relative of a child, desiring to obtain an order of chancery, taking the child away from the father for misconduct of the latter, to settle upon the child a certain amount of property. But it was finally settled that the jurisdiction did not rest on property (*In re Spence*, 2 Phil. 247; *In re Fynn*, 2 De Gex & Sm. 457, 481); though the Chancellors often refused to exercise it in cases where the infant had no property, because, without the aid of property, it could not be conveniently and beneficially exercised. *In re Fynn*, *supra*.

In the exercise of that jurisdiction it will appear that the English Court of Chancery went so far as to level orders and decrees against parents and guardians residing in foreign countries, — in France and America, and that it stood ready to enforce those decrees by imprisoning the defendants in the Fleet, whenever they should set their feet upon the soil of England, — a jurisdiction which, it may be assumed, no American court would dare to exercise. But, while thus attempting a tyrannical and extra-territorial jurisdiction against parents, no Court of Chancery in England ever made an order requiring a father, however wealthy, to set apart out of his own estate a fund for the maintenance and education of his infant child, or even to provide sustenance for such child. The common law of England has, from the earliest times, left this duty to the natural feelings of the parents, and experience has shown that the confidence has not in general been misplaced. If distressing circumstances to the contrary sometimes arise, the most that can be said is that they illustrate a profound defect in the common law. The court cannot remedy this defect, for the courts have no legislative power. Arguments, addressed to us upon the reason and humanity of the rule which would sustain this action, are vain. They are addressed to a tribunal which has no jurisdiction to change the law of the land.

We have been referred to the case of *Cowls v. Cowls*, 8 Ill. 435, in which the court sustained an action by a divorced wife against her husband for the maintenance of the children of the marriage. Without reference to the ground on which the relief was put, it is sufficient to say that it is no authority for the present action. The action was brought by a wife who had been divorced against her late husband, and it may be assumed that the court still possessed jurisdiction over the subject of alimony and maintenance. But, whatever may be said of the ground on which that case proceeded, we are obliged to say that a single decision cannot change a rule of the common law which has been settled for ages.

The view which we take of this petition renders it unnecessary to consider whether, in view of the jurisdiction over the guardianship of minors, which our statutes have vested in the Courts of Probate, such a jurisdiction as is here invoked could be held to exist in the Circuit Courts in any event.

The judgment will be affirmed. All the judges concur.

PRETZINGER v. PRETZINGER.

1887. 45 *Ohio State*, 452.¹

ERROR to the Circuit Court of Montgomery County. Izora Pretzinger sued Jacob Pretzinger, her former husband, to recover for necessities furnished by her to their minor child after a decree of divorce. The Circuit Court rendered judgment for the plaintiff, and Jacob Pretzinger brought error.

H. M. Cole and *W. Belville*, for plaintiff in error.

Craighead & Craighead, for defendant in error.

DICKMAN, J. Issues of fact were joined between the parties, and upon submission to the court they were found for the defendant in error; but no exceptions were taken on the trial, and the record contains no bill of exceptions embodying the evidence. The only questions before us for consideration are such as may arise upon the original petition and subsequent pleadings. It is contended in behalf of Jacob Pretzinger that the original petition did not state facts sufficient to create a liability on his part, and that the Court of Common Pleas should have entered up judgment in his favor, on the pleadings.

Izora Pretzinger was divorced from her husband, by reason of his misconduct, and his ill-treatment and neglect of her; and was, in consequence, awarded the custody, nurture, education, and care of their minor child, then about eight years of age. The court decreed an allowance to her as alimony, but it does not appear that any allowance was made to compensate her for the expense of her son's maintenance. For several years after the granting of the divorce she furnished to her son such boarding, clothing, care, and attention as were necessary and appropriate to his comfort and condition in life. When the divorce was granted the father was insolvent, but at the rendition of the judgment in the case at bar he was solvent and able to support his son.

The duty of the father to provide reasonably for the maintenance of his minor children, if he be of ability, is a principle of natural law. And he is under obligation to support them, not only by the laws of nature, but by the laws of the land. As said by Chancellor Kent, "The wants and weaknesses of children render it necessary that some person maintains them, and the voice of nature has pointed out the parent as the most fit and proper person." 2 Kent's Com. 190*; and see *Trustees Jefferson Tp. v. Trustees Letart Tp.*, 3 Ohio, 100; *Edwards v. Davis*, 16 John. 281. This natural duty is not to be evaded by the husband's so conducting himself as to render it necessary to dissolve the bonds of matrimony, and give to the mother the custody and care of the infant offspring. It is not the policy of the law to deprive children of their rights on account of the dissensions of their

¹ Statement abridged. Arguments omitted. — ED.

parents, to which they are not parties ; or to enable the father to convert his own misconduct into a shield against parental liability. The divorce may deprive him of the custody and services of his children, and of the rights of guardianship against his will ; but if by the judgment of the court, and upon competent and sufficient evidence, he is found to be an unfit person to exercise parental control, while the mother is in all respects the proper person to be clothed with such authority, he cannot justly complain.

The alimony allowed by the court below is not to be construed into an allowance for the support, also, of the child. Alimony, in its proper signification, is not maintenance to the children, but to the wife ; and the fact that there has been a judgment of divorce, with alimony and custody of minor children to the wife, will not of itself operate as a bar to a subsequent claim against the husband for the children's maintenance.

We think it is a sound principle that, if a man abandons his wife and infant children, or forces them from home by severe usage, he becomes liable to the public for their necessities. The doctrine is stated in *Weeks v. Merrow*, 40 Me. 151, that, if a minor is forced out into the world by the cruelty or improper conduct of the parent, and is in want of necessities, such necessities may be supplied, and the value thereof collected of the parent, on an implied contract. See also the language of Metcalf, J., in *Dennis v. Clark*, 2 Cush. 352 ; 2 Kent's Com. 193 ; *Stanton v. Willson*, 3 Day, 37 ; Lord Eldon, in *Rawlyns v. Vandyke*, 3 Esp. 252 ; *Fittler v. Fittler*, 33 Pa. St. 50. There is evidently no satisfactory reason for changing the rule of liability, when, through ill-treatment, or other breach of marital obligation, the husband renders it necessary for a court of justice to divorce the wife, and commit to her the custody of her minor children. If, under such circumstances, upon the allowance of alimony with custody of children, the court omits to make an order for the children's maintenance, the father's natural obligation to support them is of none the less force.

It has been held in England that, where a wife is living separate from her husband on account of his misconduct, and the custody of their infant child is given to her against the husband's will, by the Master of the Rolls, under the statute, the wife will be clothed with power to pledge the husband's credit, for the reasonable expenses of providing for the child. *Bazeley v. Forder*, 3 Q. B. L. R. 559, was an action for goods sold and delivered. The plaintiff, on the order of the defendant's wife, had supplied clothes for the defendant's child. The wife was living separate from him, for reasons which justified her doing so ; and the child, which was under seven years of age, was living with her, against the defendant's will, having been transferred by judicial order, under the statute, from the father's custody to that of the mother. Blackburn, J., said : " I think, on principle, that as soon as the law became such that a wife separated from her husband might properly and legally have the custody of her infant children under the age of

seven years, though the husband objected, it became a reasonable and necessary thing that she should clothe and feed those children according to their degree. It is true that in one sense this is an expense voluntarily incurred by the wife, as she is not obliged to ask for, or take the custody of her child; but I think the wife's authority in such cases is to pledge the husband's credit for her reasonable expenses, though they exceed what she is obliged to incur."

It is urged that the father is released from obligation to maintain his infant children, when deprived of their society and services against his will. But if voluntary misconduct on his own part leads to the deprivation, he is himself responsible, and not the court which intervenes for the protection of his children. And if the father, as against a stranger, cannot escape liability for necessities furnished to his minor children, though remaining with their mother after the divorce, the mother will not be barred of an action against her former husband, for the expense of maintaining the children. After a dissolution of the marriage relation by divorce, the parties are henceforth single persons, to all intents and purposes. All marital duties and obligations to each other are at an end, and they become as strangers to each other. Upon the establishment of such new relations, a promise may be implied, on the part of the father, to pay the mother, as well as a third person, who has supplied the necessary wants of his infant child.

The statute, 43 Eliz. Ch. 2, directs that "the father and mother, grandfather and grandmother, of poor, impotent persons, shall maintain them, if of sufficient ability, as the quarter sessions shall direct." Its provisions have been re-enacted in several of our States; and in view of the special enactment it has been held that, where the husband and wife are divorced, and upon her application the custody and control of their minor children are awarded to her, she cannot, in an action against the father, recover for the entire support of such children furnished by her after the divorce, but only for contribution. But there is no such statute in this State, and in general, after a divorce as well as during coverture, the primary duty of maintaining any minor child of the marriage still remains with the former husband.

An early case in support of the conclusions to which we have arrived is *Stanton v. Willson*, *supra*, a decision, says Ellsworth, J., in *Finch v. Finch*, 22 Conn. 421, "well considered by a court of distinguished and unsurpassed ability, and which, so far as my knowledge extends, has ever been satisfactory to the judges and the profession, and sustained by principles as old as the common law itself." The action was book-debt by the plaintiff, the former wife of John Bird, against Willson, executor, for education and support, furnished by her, before her inter-marriage with Stanton, to the children of Bird. The court say: "By the divorce, the relation of husband and wife was destroyed; but not the relation between Bird and his children. His duty and liability as to them remained the same, except so far forth as he was incapacitated, or discharged, by the terms of the decree. This decree takes

from him the guardianship of two of his children. This transfer of the guardianship to the plaintiff vested her with powers similar to those of guardians in other cases; and the appointment of the plaintiff to this trust did not subject her to the maintenance of the children, her wards, any more than a stranger would have been subjected by a like appointment. By accepting the trust, she became bound to provide for, protect, and educate them, at the expense of Bird, unless the decree of the General Assembly has made other adequate provision, which by the terms of that decree she is bound to apply. This is not the case here. The sum allowed was directed to be paid to her as her part and portion of Bird's estate, and in lieu of all claims of dower."

Other well-considered cases have enforced the same doctrine. In *Plaster v. Plaster*, 47 Ill. 290, there was a decree dissolving the marriage relation, and giving the custody of the minor child to the mother, because of the unfitness of the father, and allowing a sum in gross as her alimony. A supplemental petition was afterwards filed by the mother, claiming pay for the support and education of the child, for the time intervening between the decree granting the divorce and the filing of the petition. The petition was dismissed, and on error it was insisted that the court should have retained the petition and granted the relief sought. The Supreme Court, in reversing the decree of the court below, declared itself unable to appreciate the force of the objection that, because by the decree of divorce the custody of the child was given to the mother, the defendant was absolved from his further support and nurture. As it was the father's neglect of duty that produced the divorce, and warranted the decree giving the custody of the child to the mother, the court rightly observed that his being adjudged an improper person to have the custody, care, and education of his child, could not release him from both his natural and legal duty. The money decreed to the mother having been declared to be for her use, and there being no implication that any portion was intended as an equivalent for the support of the child, it was held that the defendant in error was liable for necessary and proper expenditures for the child's support, but only for such support as the child was unable himself to procure; and that after he became able to earn a support, in whole or in part, the father was not bound to maintain him in idleness, but only to pay for such portion as the child could not earn by reasonable effort. See also *Conn v. Conn*, 57 Ind. 323; *Courtright v. Courtright*, 40 Mich. 633; *Buckminster v. Buckminster*, 38 Vt. 252; *Holt v. Holt*, 42 Ark. 495.

It is contended that the defendant in error should have sought her remedy in the original divorce suit, by a modification of the decree. It is doubtless recognized as the general doctrine that the court may, upon application made in the same cause, modify its decree as to alimony, from time to time, on any change in the condition of the parties, as justice may require. And such modification may be obtained by an original petition upon proper allegations. *Olney v. Watts*, 43 Ohio

St. 499. But, as we have already seen, the expense of maintaining her minor child was not included in the judgment allowing alimony to the defendant in error.

Owing, it may be, to the father's insolvency, the enforcement of his obligation to provide necessaries for his child was left to the future, as his indebtedness might be incurred by the furnishing of such necessaries by others, or as his pecuniary condition might improve. But, while in the decree no order was made for the child's maintenance, the father could not avoid liability for his reasonable support, because an action against him for necessaries had been commenced in another tribunal, or because of his removal into another county. The natural obligation resting upon him in the forum of divorce would not become lifeless because its enforcement was not sought in the jurisdiction in which the divorce was granted. Although the record shows that the original action in divorce was in the Court of Common Pleas of Darke County, while the petition subsequently filed to charge the husband with the support of the child was filed in the Court of Common Pleas of Montgomery County, it was not sought in the latter court to change or modify, in any manner, the decree in the divorce cause, but only to enforce a claim growing out of a natural obligation of the father, which was antecedent to the decree, and which the decree left unimpaired.

The Circuit Court, we think, did not err in affirming the judgment of the Court of Common Pleas, and the judgment of the Circuit Court is, therefore, affirmed.

Judgment accordingly.

HALL v. GREEN.

1895. 87 *Maine*, 122.¹

PETERS, C. J. The plaintiff is the husband of a former wife of the defendant, and has been supporting in his family a daughter of his wife by her former husband (the defendant), the wife having obtained a divorce from the latter for his fault. By the decree of divorce the custody of such minor child was committed to the mother. The plaintiff now claims to recover in this action for the child's support for a period from 1884 to 1893 the sum of nearly thirteen hundred dollars. No express agreement is pretended, and only such an implied agreement as can legally result from the relations of the parties.

We are of the opinion that the action cannot be maintained. We think that, when a divorce is granted to a wife, and as a consequence of it she has committed to her the care and custody of her minor child, it follows that the father becomes entirely absolved from the common-law obligation which previously rested upon him to support such child;

¹ Statement and argument omitted. — Ed.

and that the only obligation of the kind afterwards resting upon him consists in such terms and conditions in respect to alimony and allowances as the court may impose on him in the decree of divorce or in some subsequent decree in the same proceeding.

Mr. Bishop in his treatise on Marriage and Divorce, which contains a discussion of this question and of the authorities touching it, expresses our views in the following statement: "It seems to be a principle of the unwritten law that the right to the services of the children and the obligation to maintain them go together. The consequence of which would be, that, if the assignment of the custody to the mother goes to the extent of depriving the father of his title to the services of the children, he cannot be compelled to maintain them otherwise than in pursuance of some statutory regulation. When the court granting the divorce and assigning the custody to the wife, makes, under the authority of the statute, provision for their support out of the husband's estate, it would seem, upon principles already mentioned, to be relieved from all further obligation." Bish. Mar. & Div. (6th ed.), vol. 2, § 557.¹

And we have no doubt that the same exoneration from common-law liabilities and remedies follows when the court awards the custody of the child to the mother, but is silent in its decree on the question of allowances for the support of the children or for herself.

The implication of the decree in such case is that the wife voluntarily assumed the burden of supporting the children, or that there was some other special reason for the omission. It is well known that the record does not tell the whole story of many divorce cases. It is a common thing for parties to arrange matters of alimony and allowances among themselves before the cause is heard by the court. And the court permits such settlements. *Burnett v. Paine*, 62 Maine, 122. And allowances to the wife for herself and allowances to her for the support of her children are usually included in one sum. And then the wife very often relinquishes all claim for either alimony or allowance for the support of her children, in order to remove opposition by her husband to her divorce.

We have very little doubt that there was something behind the record in the decree of divorce put in evidence here. The libel alleges instances of extreme cruelty, and prays for allowances for the wife and child. The defendant was personally notified but did not appear. And, still, costs were not granted, nor any sums of any kind allowed. The inference is quite irresistible that the divorce was procured by some arrangement of the parties. And the inference is made stronger by the fact that the libel alleges that the respondent was possessed of real estate in Rockland, and personal property in Boston.

Although a husband loses the services of his divorced wife and the earnings of their children, still he is not altogether relieved from the

¹ But compare 2 Bishop, Marriage, Divorce, and Separation, § 1223, as to the effect of a decree simply giving the custody to the wife, but silent as to the maintenance. — ED.

legal duty of assisting according to circumstances in the support of either the wife or children. The common-law obligation no longer exists, but a statutory obligation is substituted in its place. The burden of such support falls on the wife in the first instance. But the husband may be compelled at any time to assist her. There is nothing inconsistent in an application by her in subsequent proceedings in the original cause of divorce for an allowance for the support of children, if she has not had any, or for an additional allowance if she has. The statute so declares, and the court has so held. *Harvey v. Lane*, 66 Maine, 536.

In this way all the equities of the parties can best be considered and all their rights upheld. It would be unjust to allow both a common-law remedy and the statutory remedy to exist at the same time, and it would operate too severely on a husband for him to be constantly exposed to action by his divorced wife, and also by strangers to recover of him sums expended by them for the support of his children over whom he is not allowed to exercise any control. Especially would such a rule operate vexatiously when all such claims can be considered and adjusted on either legal or equitable grounds in one, and that an already existing proceeding.

We regard the case of *Gilley v. Gilley*, 79 Maine, 292, as virtually establishing the law of the present case. It was there held that a wife could maintain an action against a husband from whom she had been divorced for his fault, for the expense of supporting their minor children in her possession, but only expressly so held because she did not have the legal custody of the children. And we consider that the doctrine adopted by us in this discussion is sustained by the weight of the adjudged cases generally, although there are some authorities of a very positive character the other way. We have no doubt, at any rate, that our own policy is the better one on the questions here presented. There can be no more significant evidence of it than the fact that no such action as the present has ever until now been before the court in this State. The same question came before the Massachusetts court in the case of *Brow v. Brightman*, 136 Mass. 187, and was there determined adversely to the plaintiff.

Judgment for defendant.

GLEASON v. CITY OF BOSTON.

1887. 144 *Massachusetts*, 25.

CONTRACT, by the treasurer of the Commonwealth, for money expended from July 1, 1882, to December 1, 1884, in the relief of Daniel Harrington, a minor, who was alleged to have a settlement derived from his mother in the defendant city. Trial in the Superior Court, without a jury, before Barker, J., who found for the defendant, and

reported the case for the determination of this court. If the finding was correct in law, judgment was to be entered thereon for the defendant; if incorrect, judgment was to be entered for the plaintiff. The facts appear in the opinion.

J. Fox, for the plaintiff.

R. W. Nason, for the defendant.

DEVENS, J. It is to be considered whether Mary A. Harrington, the mother of Daniel Harrington, for whom support has been furnished by the Commonwealth, had herself acquired a settlement in the city of Boston. She was a married woman, having no settlement of her own, and none derived from her husband elsewhere in the Commonwealth. She acquired one by residence in the defendant city for five years consecutively from February 14, 1877, to February 14, 1882, unless it shall be held that she received relief as a pauper during this period, by reason that, on her application, the sum of three dollars was given to her on February 11, 1882, by the overseers of the poor of Boston, to be used for the board of her child, who was then boarded out, she being then unemployed and unable to pay its board. Pub. Sts. c. 83, § 1, cl. 6, 7, and § 2; *Taunton v. Middleborough*, 12 Met. 35.

The husband of Mrs. Harrington was living in the Commonwealth, and on February 14, 1877, and on February 11, 1882, was serving terms of imprisonment in the house of correction. Whether, in the interval between these terms, if there was any, he resided with his wife, does not appear by the report or agreed facts, but it is found that during the whole period he contributed nothing to the support of his family, and was without means, owing to his intemperate habits.

If, under the circumstances, Mrs. Harrington was not under a legal obligation to support her child, then no relief was furnished her, and, although a married woman, she acquired a settlement in the defendant city by her residence of five years therein.

By the common law, as it exists in Massachusetts, the father is bound to support his minor children, and this even if he deserts them. *Dennis v. Clark*, 2 Cush. 347. Where the wife leaves the husband, having proper cause to do so, taking her infant child with her, she carries with her his credit so as to make him responsible for the board and necessary expenses of both. *Reynolds v. Sweetser*, 15 Gray, 78; *Brow v. Brightman*, 136 Mass. 187. The legal obligation which the father is under to support the minor child is usually assigned as the reason why he is entitled to recover its wages when it has profitable employment. Upon the death of the father, if the mother is then bound to support the children, it is because she then is entitled to their wages and the custody of them. *Nightingale v. Withington*, 15 Mass. 272, 274; *Dedham v. Natick*, 16 Mass. 135; *Clapp v. Green*, 10 Met. 439.

As the personal property of the wife passed to the husband upon her marriage, at common law, she was necessarily deprived of this means of supporting her children, and all legal duties growing out of the marriage were imposed upon him. Even where the wife possesses

separate property, it has been held, independently of statutory obligation, that she is not compelled to support the children of the marriage. Thus, it is said by Lord Cottenham, in *Hodgens v. Hodgens*, 4 Cl. & Fin. 322, 374, "The children may want even the necessities of life; they may want the means of proper education; the law does not throw on the mother the duty, the legal obligation (the moral obligation we have nothing to do with here) of maintaining, educating, or providing for the children."

The Pub. Sts. c. 84, § 6, are relied on as establishing that the mother, equally with the father, is under a legal obligation to support their children. This section enacts that the kindred of poor persons "in the line or degree of father or grandfather, mother or grandmother, children or grandchildren, by consanguinity, living in this State and of sufficient ability, shall be bound to support such paupers, in proportion to their respective ability." It was founded on the St. of 1793, c. 59, § 3, which itself was based upon the St. of 43 Eliz. c. 2, § 7. This statute was in 1651 construed as not applying to *femes covert*. *Custodes v. Jinkes*, Style, 283. Apart from the principle that the adjudged construction of the terms of a statute must be deemed to be enacted as well as the terms themselves, when an act which has been passed by the Legislature of one State or country is afterwards adopted by another, *Commonwealth v. Hartnett*, 3 Gray, 450, 451, such appears to us its true construction. As remarked by Manisty, J., in *Coleman v. Overseers of Birmingham*, 6 Q. B. D. 615, where *Custodes v. Jinkes* is affirmed, the words "mother" and "grandmother" "must be read as if the description were 'mother and grandmother not being under coverture.'" It may be that, considering the larger liberties and rights now given to married women, their responsibilities and legal duties should be enlarged also. This is a matter for legislation. If the statute is properly construed in view of the circumstances which existed when it was passed, such judicial construction should still prevail.

Nor if we assume that the husband entirely abandoned the wife during the five years' residence, which is the aspect of the case most favorable to the defendant, was the legal duty of supporting the child imposed upon the wife. That still remained upon the husband, and he could not extricate himself from it by abandoning his family, or so conducting himself that his means of performing it were necessarily curtailed during his lawful imprisonment. Those who furnished support to his children had a lawful claim against him for the expenses. It was not intended that the father and mother should be jointly responsible; she becomes so only when he has ceased to be so. While the mother has greater rights over the child when she and it have been abandoned by the father, and while he will not be allowed to interfere with any reasonable contract made by her for the nurture or the employment of the child, this is upon the ground that he has authorized such contracts by his relinquishment of control over it, and not because he is no longer liable for its support. *Wodell v. Coggeshall*, 2 Met. 89;

Dumain v. Gwynne, 10 Allen, 270. No facts here exist such as are found in *Brow v. Brightman*, *ubi supra*, where, the care and custody of the child having been given to the mother by a decree of the court, it was held that the father was not liable for its support. No contract could be applied against the husband, as he had ceased to have any control over the child, or any right to make any provision for it except with the mother's consent. The only remedy to obtain such provision for the child as the father might be able to furnish would be under the decree. In the case at bar, the husband had the full right to resume his control over the child, unless some order of court had intervened, and to make provision for it in his own way, and it was his duty to do so in a proper manner. This duty, incumbent on him, was not devolved on his wife by his crime or neglect. She was not under a legal obligation to support the child, and the assistance afforded her in doing so was not relief extended to her as a pauper.

The wife having acquired a settlement in Boston, and the husband having none in the Commonwealth, the child follows and takes the settlement thus acquired by its mother. Pub. Sts. c. 83, § 1, cl. 2. The plaintiff is therefore entitled to recover.

*Judgment for the plaintiff.*¹

BRADBURY, J., IN FULTON v. FULTON.

1895. 52 *Ohio State*, 229, p. 238-240.

BRADBURY, J. . . . The husband and father while living with his family is its head, is entitled to the services of his minor children, and is liable for their reasonable support. Revised Statutes, §§ 3108, 3109, 3110, 3113; *Sharp v. Cropsey*, 11 Barb. (N. Y.) 224.

Where, however, the husband is dead, the modern and better rule is that the mother is the head of the family and entitled to the earnings and obedience of her minor children. *Commissioners v. Hamilton*, 60 Md. 340; *State, for use of Coughlan, v. B. & O. R. R. Co.*, 24 Md. 84; *O. & M. R. R. Co. v. Tindall*, 13 Ind. 366; *Furman v. Van Sise*, 56 N. Y. 435; *Matthewson v. Perry*, 37 Conn. 435; *Hammond v. Corbett et al.*, 50 N. H. 501; *Gray v. Durland*, 50 Barb. 100.

And whenever the mother is entitled to the obedience and services of her minor children, it would seem to follow, necessarily, that she should maintain them. Harsh and anomalous, indeed, a rule of law must be that would give the earnings and custody of a minor child to a parent who was under no reciprocal obligation of maintenance. The

¹ By the statutes of some States, the duty of supporting the children is now imposed upon the wife, or upon her separate estate, under certain circumstances; sometimes jointly with the husband, and sometimes contingently in case of the husband's inability. — Ed.

duty of maintenance by the mother is asserted by Schouler, Domestic Relations, § 293; *Mowbry v. Mowbry*, 64 Ill. 383. In *Dedham v. Natick*, 16 Mass. 140, the court say: "The mother, after the death of the father, remains the head of the family. She has the like control over the minor children, as he had when living. She is bound to support them, if of sufficient ability; and they cannot, by law, be separated from her."

The cases, indeed, are rare where a mother, having the ability, has declined to administer to the wants of her minor child. The law of nature is usually strong enough to secure this, and an appeal to municipal law is therefore seldom necessary. But, if a widowed mother with ample possessions should decline to administer to the necessities of her destitute minor child, a rule of law that would allow this, and suffer her to abandon it to private or public charity, would be a reproach to any system of jurisprudence.

If she is not bound to maintain her child, then she should not be permitted to keep it in subjection to her authority, or receive the wages of its labor. The right to keep her minor children together under her roof and to control their persons, implies the obligation to feed and clothe them; and the great weight of modern authority, as well as of reason, clothes her with those rights. It may be that the authorities do not speak with equal emphasis upon the question of her duty of support, as they do in reference to her right to the custody and services of her children, but this should be attributed to the want of an occasion, and not to the existence of any rule of law by which she can be vested with the control without the duty of maintaining her minor children. . . .

JERVOISE v. SILK.

1813. *Cooper's Chancery Cases* (tempore Eldon), 52.

In this case, which was a petition to confirm a report of maintenance, it appeared that the father, who sought for maintenance, had £6,000 a year; that the six infants, his children, were entitled to an estate of £8,600 a year, according to the present rental, but which, of course, would increase.

No report had been made as to debts.

The petitioner, however, stated by affidavit that the expenses of his establishment, consisting of a house in Hanover Square, a house in Essex, and another in Hampshire, which latter, however, he was proceeding to dispose of, were fully equal to his income. The master had found that £1,400 a year for the six children, the eldest being thirteen, including a governess for the girls, would, in his opinion, be a proper allowance. By affidavit it was stated that the funds were sufficient for debts, &c.

Mr. *Hart* opposed the confirming the petition upon two grounds: 1. Of the father being competent, having £6,000 a year. 2. That the application was premature, the debts not being paid.

Sir *Samuel Romilly*, Mr. *Richards*, and Mr. *Cooper*, for the petitioners.

The preliminary objection has been got over by Lord Eldon, in *Warter v. —*, 13 Ves. 92, upon the authority of a case cited of *Wear v. Wilkinson*, before Lord Roslyn, and upon the principle of the length of time the taking the accounts might consume. It is enough if the court is satisfied *aliunde* that the property is sufficient; 2d, though *prima facie* £6,000 a year seems to give a father competency to maintain his children, yet his establishment must be looked to, and the expectations of the children taken into consideration.

Sir WILLIAM GRANT. It is very loose to consider any particular income as enabling a father to maintain his children. To a nobleman £6,000 a year certainly would not be thought enough to exclude him from requiring some maintenance out of his children's fortunes. To a private gentleman it may be otherwise. On the outside it here would seem enough; at the same time, the expenses of his establishment and his children's expectations are circumstances to be looked to. It would be a harsh thing for the court to oblige the petitioner to put down his establishment in any part to educate his children when they have large incomes of their own. In the present case, therefore, I shall confirm the report upon this ground, that I do not see enough to make me dissent from the conclusion the Master has drawn, who, of course, had his attention directed to all the facts and particulars more than the court can possibly have.

BLACHLEY v. LABA.

1884.. 63 Iowa, 22.¹

BECK, J. I. The amount in controversy in this cause being less than \$100, it was certified by the judge of the Circuit Court for determination upon the following question of law:—

“Is a father legally liable to a physician for the latter's services in professionally treating the adult but unmarried daughter of said father, during her last illness, where the physician was called by the daughter, she at the time living with her father as a member of his family, that being her home,—the treatment being necessary and proper, and rendered with the knowledge of the father, and without any objection on the part of the latter to the physician.”

II. At common law a father is not liable for necessities furnished an adult child. And it may be admitted, for the purposes of this case,

¹ Statement omitted. — Ed.

that medical treatment is included in the term "necessaries." This rule prevails, though the child be at the home of the father when the necessities are furnished. *Crane v. Baudouine*, 55 N. Y. 256; *Boyd v. Sappington*, 4 Watts, 247; *Mills v. Wyman*, 3 Pick. 207; *Norris v. Dodge's Admr*, 23 Ind. 190; *Wood v. Gill*, Coxe (N. J.), 449.

The fact that the adult child is a member of the family of the father does not render him liable for necessities furnished upon request of the child. The father as the head of the family is not liable for necessities furnished its members, other than the wife and minor children. Servants, lodgers, and boarders are members of the family, as well as all others who are subject to the authority of its head. See Webster's Dictionary. But for necessities furnished none of them is the father liable. An adult son or daughter, whose home is with the father, is of this class of persons.

III. It is argued that, as an adult son or daughter who lives with the father and renders to him personal service cannot recover compensation for such services from the father, he ought to be liable for necessities furnished to such an one. This point we are not permitted to decide, for the reason that it is not presented by the question certified to us. It is not shown therein that the daughter in this case rendered any services. Our decision must be confined to the very question of law certified, and cannot be extended to facts not contemplated in it.

IV. Counsel for plaintiff thinks that Code, § 1330, which provides that the father of a poor person, who is unable to maintain himself at work, shall be liable for his maintenance, has application to this case. But the question certified does not contemplate the fact that the daughter was a poor person; and we cannot presume that she was. The facts upon which we are to decide the case do not present this point.

V. Counsel for plaintiff also insists that defendant's liability arises under Code, § 2214, which provides that "the expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately." The purpose of this section is not to declare what charges or expenditures shall be regarded as "expenses of the family," but simply to provide a remedy therefor against both husband and wife. The section gives no aid in determining what are to be regarded as family expenses.

We have shown that the father is not liable for necessities furnished to his adult son or daughter who lives with him in the manner shown by the facts certified in the question submitted to us. It may be admitted that he is liable for all family expenses; but, as he is not liable for necessities furnished for an adult child, under the circumstances stated in the questions certified, they therefore constitute no part of the family expenses.

The foregoing discussion disposes of all points argued by counsel. It is our opinion that the judgment of the Circuit Court ought to be

Reversed.

EDWARDS AND WIFE v. DAVIS.

1819. 16 *Johnson* (New York), 281.¹

ERROR to the Court of Common Pleas. Davis brought an action of *indebitatus assumpsit* against Edwards and wife to recover for necessities furnished to the parents of Mrs. Edwards. Davis's and Edwards's wives are sisters, whose parents have eight children. Edwards's wife was, before the marriage with Edwards, a widow. Her parents were poor and feeble, and unable to maintain themselves. The plaintiff, Davis, had, during the widowhood of Mrs. Edwards, expended the sum of \$396.08, and claimed to recover one-eighth thereof of Mrs. Edwards, who, while a widow, had sufficient property to have paid said sum. The Court of Common Pleas, upon the report of referees, rendered judgment against Edwards and wife for said one-eighth, viz., \$49.51.

Loucks, for plaintiffs in error.

N. Williams, contra.

SPENCER, C. J. On the argument these questions were discussed: whether, independently of statutory provisions, at common law, a child, having sufficient property, was liable, merely from that relation, to support her parents; and whether a suit could be maintained by any person, furnishing a necessary support to the parents, against such child?

The duty of a parent to maintain his offspring until they attain the age of maturity is a perfect common-law duty. The liability of a child to support its parents, who are infirm, destitute, or aged, is wholly created by statute; and it has been truly said that the statute imposes on such relatives duties unknown to the common law. (Reeves' Domestic Relations, 284; 1 Bl. Com. 448.) In *Rea v. Munden*, 1 Str. 190, Pratt, Ch. Justice, said, with the concurrence of the court, "By the law of nature, a man was bound to take care of his own father and mother, but there being no temporal obligation to enforce that law of nature, it was found necessary to establish it by act of Parliament." Our statute for the relief and settlement of the poor (1 N. R. L. 286, § 21) provides, that the father and grandfather, mother and grandmother, being of sufficient ability, of any poor, blind, lame, or decrepit person, not being able to maintain himself, and becoming chargeable to any city or town, and the children and grandchildren being of sufficient ability of such poor, blind, lame, or decrepit person, not being able to maintain himself, and becoming chargeable, as aforesaid, shall respectively, at their own charge and expense, relieve and maintain every such poor person, in such manner as the justices of the peace of the county, at their general sessions of the peace, shall order and direct, on pain of forfeiting and paying one dollar and twenty-five cents for

¹ Statement abridged. Arguments omitted. — Ed.

each person so ordered to be relieved, for every week such order shall not be obeyed, to be sued for by the overseers of the poor of the city or town to which such poor person shall be chargeable.

Now, the duty of a child, of sufficient ability to maintain its poor and destitute parents, being an imperfect one, not enforced at the common law, and the statute having prescribed the manner in which it is to be enforced, and the extent of the penalty, the statute remedy is the only one to be resorted to. This principle was recognized by this court in *Almy v. Harris*, 5 Johns. Rep. 175. Then, the consequence necessarily follows, that no one who has afforded relief to indigent persons, from motives of humanity, or from any other consideration, can maintain a suit, as upon an implied contract, against the children of such parents, arising merely from the duty which such child owes to its parents, to support them.

It was urged on the argument that the court would intend a request, from the moral duty operating on the child; it is true that a request has been inferred, as in the case of *Oatfield v. Waring*, 14 Johns. Rep. 192, from the beneficial nature of the transaction, and the circumstances of the case. In the present case, the maintaining the parents of the wife of the plaintiff in error, while she was sole, could not be considered a benefit to her; and the circumstances negative the idea that any request was made by her, or the defendant in error, to maintain and support her parents.

[Remainder of opinion omitted.]

Judgment reversed.

CHAPTER III.

PROPERTY OF CHILD OTHER THAN EARNINGS.

LINTON v. WALKER.

1858. 8 *Florida*, 144.¹

BALTZELL, C. J. — This is a suit of the infant children and heirs of the late Mrs. Minor Walker, claiming of the appellant, Linton, the hire of fifteen slaves which they own through a legacy from their grandfather, Jacqueline Peterson, who, in the year 1824, made his will in Hancock, Georgia, giving this and other property to his daughter Martha, their mother, and after her death to her children. Minor Walker intermarried with her, and by this means became possessed in 1837 of her property. On the first of January, 1850, he hired the negroes to Linton for a term of five years, and has received all, or the larger portion, of the price agreed to be paid. Mrs. Walker died previously to the year 1850. The right of the children to the negroes is not contested. The present suit is through their guardian to obtain the amount due for the hire, insisting that the payment to their father was not valid.

Two pleas filed in the court below, and adjudged insufficient, present the question raised for consideration in this court.

The first sets up the payment to the father of the plaintiffs, as their natural guardian, of a large sum in full discharge of this hiring, and that plaintiffs, by their natural guardian, received said sum in full satisfaction, &c.

It is too well settled to admit of question that such a payment is not an acquittance nor satisfaction.

The true doctrine on this subject will be found in the recent editions of Blackstone to this effect: "Guardianship by nature confers no right to intermeddle with the property of the infant, but is a mere personal right to the custody of the *person* of his heir." 1 Black. Com. p. 460, n. 1.

And so in the American elementary works. 2 Kent Com. 217; 1 Bouv. Inst. 139. The American courts hold in like manner, though in language somewhat differing. "A guardian by nature has no control over the property, real or personal, of his child; he is not entitled to the personal estate of his ward." "A payment to him on account of

¹ Statement omitted. — Ed.

the child is no payment." 1 John. Chy. 3; 7 Cowen, 38; 7 Wend. 354; 15 Wend. 631; 2 Mass. 55; 3 Pick. 213; 2 Hill (S. Car.), 288; 5 Porter (Ala.), 385; Walker (Miss.), 49; 9 Wend. 504; 9 B. Mon. 324 (Ky.). The defence set up in this plea, then, is clearly untenable.

[Remainder of opinion omitted; also the opinions of Du Pont, J., and PEARSON, J.]

BIGELOW, C. J., IN BANKS v. CONANT.

1867. 14 *Allen (Massachusetts)*, 497, p. 498.

BIGELOW, C. J. In consideration of the duty which the law imposes on a father to furnish adequate support to his child during infancy, the services of the child during that period are due to the father, and, if they are rendered to a third person, the right of the father to recover the value thereof is clear and indisputable. But this is the extent of the father's right. He has no title to the property of the child, nor is the capacity or right of the latter to take property or receive money by grant, gift, or otherwise, except as a compensation for services, in any degree qualified or limited during minority. Whatever, therefore, an infant acquires which does not come to him as a compensation for services rendered, belongs absolutely to him, and his father cannot interpose any claim to it, either as against the child, or as against third persons who claim title or possession from or under the infant.

CHAPTER IV.

PARENT'S RIGHT TO EARNINGS OF CHILD. EMANCIPATION

BENSON v. REMINGTON.

1806. 2 *Massachusetts*, 113.

THIS was an action of assumpsit brought by the plaintiff for wages due him for the services of his daughter. Upon the general issue pleaded, the cause was tried before Sewall, J., in December last. There was a verdict for the plaintiff; and now *Ashman*, on the part of the defendant, moves for a new trial, on the report of the judge, which was in substance as follows:—

The plaintiff supposes the term of service, for which he demands wages, to commence in July, 1801. It appears that his daughter, Phœbe Benson, by whose labor these wages have been earned, was then thirteen years of age; that she had been, for some years before that time, in the family of the defendant; that, having been found in a very helpless condition, she had been taken by the defendant and his wife from the family of the plaintiff, which he had forsaken and left in extreme poverty; that in July, 1801, the plaintiff, having returned to his family, applied to the defendant for payment of his daughter's wages to that period. This demand was compromised by the opinion of some neighbors that the plaintiff was not entitled to any compensation at that time. The defendant then offered to take the daughter, if her father would engage her to him until she should arrive at the age of eighteen years, and to give her at that time certain specific articles, in lieu of all other wages. This offer was refused by the plaintiff, but he consented that his daughter should remain with the defendant, provided he should have a right to take her away whenever it should please him. The daughter continued with the defendant, and in his service, until December, 1804, about three years and five months, when the plaintiff took her away.

The judge who sat in the trial directed the jury to find a verdict for the plaintiff for such sum and amount of wages as they might think due upon the whole; and they found accordingly.

The verdict was taken, subject to the opinion of the court whether

the plaintiff, under these circumstances, can maintain this action for the wages and earnings of his daughter.

Ashman, for the defendant. It does not appear that the present plaintiff has ever been at any expense, or ever paid any attention to this child, either before or during the time for which he demands her wages. It is presumed that the only right on which a parent can entitle himself to the services of his child arises from the provision he makes for the support of the child, and the care and labor he bestows on its instruction and education. Here is not even this ground on which to raise a promise. If the plaintiff recover this money, he receives it to his own sole use, and the child is not to be benefited by it. If the defendant really owes these wages, he owes them to the child, who has rendered the services, and she ought to have brought the action in her own name by her next friend.

Woodbridge, who was to have argued in support of the verdict, was stopped by the court.

SEWALL, J., observed that, at the trial, he had some doubts in this cause; but since that time, on recurring to the books, and recollecting some former determinations of this court, he had satisfied himself that the verdict ought to stand.

SEDGWICK, J. I will not say, that where a parent wholly abandons his child, as the defendant's counsel seems to suppose the plaintiff has done here, he has a right to the earnings of such child. This is not, however, the present case. It appeared that the plaintiff had paid attention to the child. Everything that had taken place relative to the services of the daughter, antecedent to July, 1801, was then compromised between the parties, and the daughter continued in the service of the defendant three years and five months under a new agreement, or to say the least, under a caution from the plaintiff that his legal claims were not waived. The plaintiff was responsible for any necessary expenses of his child; and such expenses, if any had been incurred, were proper to be submitted to the jury, by way of set-off against this demand for wages — of the amount of both which, they were the regular and competent judges. I see no foundation to doubt of the correctness of the decision of the judge at the trial, and am therefore against setting aside the verdict.

PARSONS, C. J. The law is very well settled, that parents are under obligations to support their children, and that they are entitled to their earnings. It is true, parents may transfer this right, or authorize those who employ their children to pay them their own earnings, and the payment will be a discharge against the parents. But no such facts appear in this case. When the plaintiff's child was thirteen years old, he makes his claim upon the defendant for her past services. This demand was adjusted by an arbitration. After this the plaintiff consented, on certain conditions, that she should continue in the service of the defendant, who was apprised that her father claimed a right to her earnings; notwithstanding which, he continued to retain her.

He must be liable to pay the plaintiff the real value of the services rendered by his daughter. That value has been settled by the proper tribunal, and there is no sufficient reason for setting aside the verdict.¹

Judgment according to verdict.

HAMMOND v. CORBETT AND TRUSTEE.

1872. 50 *New Hampshire*, 501.²

THE action was assumpsit, by Thomas Hammond against Mary C. Corbett and trustee, for the price of wood furnished her for her own use; and the verdict was for the plaintiff. The defendant is, and when this suit was brought was, a widow. A minor son of the defendant (about sixteen years of age) worked for the trustee, and there was found in his hands about sixty dollars, wages due for labor of said minor son. It did not appear that the minor son had ever chosen a guardian, or had any appointed by the Probate Court, or that he had ever been emancipated.

The question as to liability of the trustee was reserved.

Dudley, for the plaintiff.

Fletcher & Heywood, for the trustee.

FOSTER, J. [After quoting and commenting upon numerous authorities.] It will probably be found, upon a critical examination, that in a majority of the cases the right of either parent to control the services and earnings of the minor child is placed upon the doctrine of compensation, — as, to some extent, an equivalent for the parent's obligation to support and maintain the child.

But we have recently reaffirmed the doctrine, in this State, that, except by the operation of the poor-laws, a parent is under no legal obligation to maintain his minor child. *Kelley v. Davis*, 49 N. H. 187. See, to the same effect, 1 Bl. Com. 449; *Mortimore v. Wright*, 6 M. & W. 488; *Bazeley v. Forder*, L. R. 3 Q. B. 565.

Our statute, providing for the reimbursement of towns for supplies furnished to paupers, imposes the duty of maintenance as well upon the mother as the father. Gen. Stats. ch. 74, § 8.

It follows, then, that in so far as the right to the child's services is

¹ *Nightingale v. Withington*, 15 Mass. Rep. 272; *Keene v. Sprague*, 3 Greenl. 77; *Plummer v. Webb*, 4 Mason, 380; *Gale v. Parrot*, Adams's N. H. R. 28; *Jenney v. Alden*, 12 Mass. Rep. 375; *Angel v. M'Lellan*, 16 Mass. Rep. 28; *Whipple v. Dow & Ux.*, 2 Mass. Rep. 415; *Dawes v. Howard*, 4 Mass. Rep. 97; *Freto v. Brown*, 4 Mass. Rep. 675; *Commonwealth v. Hamilton*, 6 Mass. Rep. 273; *Vide Whiting v. Earle & Tr.*, 3 Pick. 201; *Burlingame v. Burlingame*, 7 Cowen, 92; *Chilson v. Phillips*, 1 Verm. R. 41; *Emery v. Gowen*, 4 Greenl. 3; *Commonwealth v. Murray*, 4 Binn. 492

² Arguments and part of opinion omitted. — ED.

to be regarded as compensation for the obligation of the parent to reimburse the town for supplies furnished the child, the father and the mother stand on precisely the same ground in this respect; while neither father nor mother is entitled to the services of the minor child, upon this principle of compensation, if they are themselves so poor as to be unable to support the child; since the statute imposes the obligation of support only upon "relations" of the poor person, "of sufficient ability;" and, therefore, the poorer the parent, the less is he or she entitled to the child's wages.

Now all this is extremely unsatisfactory, for the reasons already suggested; but more particularly because, under the statute, children or grandchildren, and parents or grandparents, of sufficient ability, are liable to maintain the child or grandchild in the one case, and the parent or grandparent in the other. And if the right to the services should follow the liability under the pauper act, the children would have a right to the services of the parents and grandparents; and the grandparents the right to the services of the grandchild, as well as the parents to the services of the children.

In short, this doctrine seems to be repugnant to the reason and the logic of the law; and if it has been assented to thus far, it should now be repudiated. We therefore lay the pauper statute out of the way of this consideration.

Must we come back, then, to the "principle of slavery," as that upon which the parent is entitled to the child's wages? and if so, must we adopt the result of Mr. Ch. Justice Richardson, in *Riley v. Jameson*, that "a mother stands on different ground from a father in respect to her children," and the proposition of Blackstone, that "a mother, as such, is entitled to no power, but only to reverence and respect"? or shall we adopt the contrary conclusion of Mr. Justice Wilde, in *Dedham v. Natick*, that "the mother, after the death of the father, remains the head of the family. She has the like control over the minor children as he had while living"?

In pursuing these considerations, we are naturally led to inquire, What is the reason (nowhere expressed) *why* "the mother stands on different ground from a father, with respect to her children"? *why* is she "entitled to no power"? and why are these propositions made the foundation for the authorities that hold that she has no right, except as compensation for maintenance and support, to control the services and earnings of the child?

We suspect the distinction will be found to have no substantial foundation in reason, but that it is simply a result and reflection of and from the old feudal doctrine and principle which, requiring the abject subjection and servitude of the wife, was unable to recognize the supremacy of the mother. The mother (such is the feudal principle) has no power of control over the child, because the wife and mother is as much the slave of the husband as the child is. Or it may be that it has its foundation in still more remote ages, when woman was re-

garded as in all respects and by creative design an inferior being, very far from capable of having any power or right of authority, — naturally and necessarily subject to and the object of control.

It was upon this feudal system, which regarded not only the husband and wife as one, but “the husband as *that* one,” denying to woman that place and those rights which she ought to have, that the common law is founded; and this old system has engrafted upon our jurisprudence many rules and forms for which, like the proposition we are now considering, no logical reason can be stated. See 1 Pars. Con. (5th ed.) 339.

Not until the polite reign of Charles the Second (1 Bl. Com. 445) did it begin to be doubted that a man might reduce his wife to subjection by means of corporal punishment; while the civil law permitted him, *flagellis et fustibus acriter verberare uxorem*; but this “ancient privilege,” as Blackstone terms it, has in later times been questioned even in England, is repudiated in Ireland and Scotland, has met with very little favor in this country, and has never been recognized in this State. *Poor v. Poor*, 8 N. H. 313. See Bishop M. & D. §§ 4, 85; Schouler’s Dom. Rel. 59. And at length it has come to pass that the gradual elevation of woman, in social, domestic, and practical business life, has swept away the principles and theories lying at the foundation of such distinctions as have been recognized in the respect of the present inquiries.

It has always been the glory and honor of our New England homes, that, with the death of the father, paternal authority is accorded to the widow. She becomes, in very truth, the head of the family; and only that household is well regulated, prosperous, and happy, where the children cheerfully accord to the mother, not alone the affection and care which nature prompts, but the reverence, honor, and obedience which her station demands.

Such being the happier condition of the present age, and mindful of the successive steps of legislation in this State tending in the direction of the equalization of the legal rights and the social position of the sexes, we are not inclined to recognize the “principle of slavery” as any longer controlling the doctrine of the right to the child’s wages, — if, upon that principle, the widowed mother is to be excluded, — but, rather, to insist that, in so far as the right to the child’s services depends upon authority and control of the person, there can be no distinction between the case of the father and the widowed mother, the child having no other guardian.

Cessante ratione legis, cessat ipsa lex; and if in remote times there was a reason for making a distinction between the liability of the father and the widow, there would seem to be none now. Women, whether married or single, now own and control property, concerning which they make contracts, and may sue and be sued; their rights are recognized and protected by the law; they do more business, and assume and have accorded to them more importance, than ever before. Their

rights and responsibilities, their privileges and their liabilities, must be regarded and construed with reference to their changed condition.

But there is a broader ground than any yet stated, upon which, as we think, it may be safely asserted that, unless in exceptional cases, a widowed mother is entitled to control the services of her minor child. It is thus expressed by Strong, P. J., in *Canover v. Cooper*, 3 Barb. 117: "The reason why parents are entitled to the services of their minor children, usually given, is that which I have already mentioned, — the liability to support them. But, in my opinion, a much stronger reason, and one much more consonant with the feelings and obligations of parent and child, is, that it gives the parent the control over the actions of his children when they are incapable of judging for themselves, and thus has a tendency to save them from the effects of idleness or imprudence. But when a parent, from confidence in his minor child, or, as is sometimes, although I hope not often, the case, from indifference as to his welfare, allows the child to manage for himself, and to obtain his support from his own industry, the reasons for the rule fail, and the rule falls with them."

Perhaps the principle upon which this rule is founded may be designated the right of guardianship, without the liability, incident to that relation, of accountability for the pecuniary trust. See *Freto v. Brown*, 4 Mass. 675; *Campbell v. Campbell*, 3 Stockt. Ch. 272, before cited.

Mr. Bishop, 2 Mar. and Div. §§ 527, 528, like the other text-writers on the subject, is evidently embarrassed by the confusion incident to this branch of the law. He tells us that "the father is, at common law, in some sense the guardian of his minor children, though in precisely what sense, the books seem not to be agreed; and that when he dies the guardianship devolves, not to its full extent, on the mother, but partly so," &c.; and of the meaning of all this we have no explanation.

So, he says, "the father is under a strong moral obligation, which the law recognizes, to provide sustenance for his minor children, to whose earnings he is entitled while he maintains them, but no longer. . . . Likewise the mother, being a widow, is entitled to the labor of her children while she supports them;" that the father may assign to another their services during minority, but it is doubtful whether the widowed mother "can assign their labor to another." See, also, where the matter is left in the same condition of uncertainty, 1 Bishop's *Married Women*, § 474.

A guardian, says Mr. Schouler (Dom. Rel. 389), is "a person intrusted by law with the interests of another, whose youth, inexperience, mental weakness, and feebleness of will disqualify him from acting for himself in the ordinary affairs of life."

"Guardianship, by nature and nurture, denotes hardly more than the natural right of parents to the care and custody of their children." . . . It "belongs exclusively to the parents, — first to the father, and, on his death, to the mother." . . . "The mother, if not superseded by the

infant's election at fourteen, or by the appointment of a new guardian, has, in the absence of the father, the legitimate care of the child " until the age of twenty-one. *Ibid.*, 391.

True, the authority of such guardians extends only to the child's person, and they have no right to intermeddle with his property : 1 Bl. Com. 461 ; but in almost universal practice, it seems to have been conceded, and we think it may be regarded as recognized therefore by law, that, as a compensation, not for the statutory *liability* of maintenance, but for the support, nurture, care, protection, and education *actually afforded and furnished* to the child, the parent has a right to control and appropriate its earnings during minority.

And in case of the father's death, the mother, in this sense, becomes truly the head of the family. She extends her maternal guardianship, her care and protection, over the minor child, and controls those little earnings which, if left to the child's disposition, might lead him into courses of wastefulness, dissipation, and ruin.

The law does not hold her to the accountability of a trustee, because it recognizes the fact that these earnings of the child can seldom be an equivalent compensation for the care and expense incurred in its support.

In *United States v. Bainbridge*, 1 Mason, 78, 79, Judge Story, speaking of the parental right of custody, says, " In whatever principle this right is founded, whether it result from the very nature of parental duties, or from that of authority which devolves upon him by reason of the guardianship by nature or nurture, technically speaking," its existence cannot be questioned. Apparently, he places the right of custody and of services on the same ground — whatever that may be.

So we, having failed to discover any sensible ground for a distinction between the rights of a father and those of a widowed mother, are inclined to hold that, in whatever principle this right is founded, whether it result from the very nature of maternal duties or from that of authority which, upon the husband's death, devolves upon her by reason of the guardianship for nurture, technically speaking, the mother is entitled to the child's services until her rights are superseded by the appointment of another guardian, or the arrival of the child at years of majority.

Judge Reeve says : " Mothers, during coverture, exercise authority over their children ; but, in a legal point of view, they are considered as agents for their husbands, having no legal authority of their own. After the death of the husband they often have authority. I deem it an immaterial inquiry whether they possess this authority in character of a parent, master, or guardian." *Reeve's Dom. Rel.* 295.

And again : " If the father die, the mother is guardian by nature to her minor children, both males and females. But the mother is not in the same situation as the father. She has no right to the personal services of her children, only when she maintains them. If they have property of their own they are to be maintained from that," pp. 319, 343.

But, in view of all the authority we have been able to discover, and upon the principles and reasons stated, we are not prepared thus to limit the authority of the widowed mother to control and appropriate the child's earnings. On the contrary, we are disposed to maintain that, between the situation of the father in the one case and the widowed mother in the other, there is no distinction in respect to the child's earnings.

The parent may allow the child to receive, and invest or control, his own wages; and in such a case, of course, the parent cannot claim them. *Burlingame v. Burlingame*, 7 Cow. 92; *Shute v. Dorr*, 5 Wend. 204; *Chase v. Elkins*, 2 Vt. 290; *Tillotson v. McCrillis*, 11 Vt. 477; *Gale v. Parrot*, 1 N. H. 28; *State v. Barrett*, 45 N. H. 16; *Lamprey v. McIntyre*, Hillsborough, June, 1872; Schouler's Dom. Rel. 368.

In the present case, it does not appear that the child had ever chosen any guardian or had any appointed by the Probate Court, or that he had ever been emancipated; and unless it shall appear, upon further disclosure (which may be permitted in behalf of the child), that such was the case, or that in some other way recognized by law, and in accordance with the views expressed in this opinion, the mother is to be excluded from the control of her son's wages,

The trustee must be held chargeable.

HOGEBROOM, J., IN GRAY v. DURLAND.

1867. 50 *Barbour* (New York), 100, pp. 218, 219, 221.

HOGEBROOM, J. (dissenting). . . . The citation to 2 Kent's Com. 190, supports the proposition, that, to a qualified extent, both the father and mother are by the statute law (1 R. S. 614) charged with the obligation of supporting their minor children, but the author (p. 191) draws a distinction between the parents, in this respect, at the common law, in these words: "The father is bound to support his minor children if he be of ability, even though they have property of their own; but this obligation in such a case *does not extend to the mother*, and the rule as to the father has become relaxed;" citing *Hughes v. Hughes*, 1 Bro. Rep. 387; *Pulsford v. Hunter*, 2 id. 416; *Haley v. Bannister*, 4 Madd. Ch. Rep. 146; *Whipple v. Dow*, 2 Mass. Rep. 415; *Dawes v. Howard*, 4 id. 97.

This author also says (p. 193): "And in consequence of the obligation of the father to provide for the maintenance, and in some qualified degree for the education, of his infant children, he is entitled to the custody of their persons, and to the *value of their labor and services*." He proceeds to argue that there is no doubt as to this right on the part

of the father until the child becomes fourteen years of age, and concludes on the whole that it exists *during their minority*, inasmuch as the father's guardianship by nature continues during that time, as also his right to appoint a testamentary guardian. This reasoning does not apply in all its force to the mother. So long as they both live, the mother's rights, so far as they exist at all, are altogether subordinate to those of the father. She cannot claim a right to the services of the children during the father's lifetime. She has a *less perfect* right to the guardianship of his *estate* (2 Kent, 205, 206), and as to the guardianship of the *person*, she may be entirely deprived of it by the exercise of the authority of the father in appointing a *testamentary guardian*. Suppose this power to have been thus exercised, would not the testamentary guardian have a right to control the services of his minor ward, and, as a consequence, to receive the compensation for those services if rendered of any other person, and thus, in any event, to deprive the mother of them? And does not this tend to the conclusion that where the right of testamentary appointment is not exercised, the right to control the services of the child is rather designed to be confided to the *guardian* of the child (who may or *may not* be the mother, after the father's death), and not to the *mother*, and must hence be exercised for the pecuniary benefit of the *child*, and not of the *mother*? These considerations seem to me not without force.

The author says (at p. 205): "The father (and on his death, the mother) is *generally* entitled to the custody of the infant children, inasmuch as they are their *natural* protectors for maintenance and education." And yet we have seen that as to the *mother*, the common-law obligation to support the child is less onerous and less perfect than in the case of the father, and of the *custody* of the children she may be wholly deprived; and as the *right* to command the services is in a great measure supposed to arise from the correlative duty of support and right of custody thus conferred, may we not infer the absence of that perfect common-law right on the part of the mother to the services of the child which is essential to maintain the constructive relation of mistress and servant?

It *may* be, as is ingeniously argued in a reported case, *Williams v. Hutchinson*, 3 Comst. 312, and is also suggested by the Chancellor in *Re Ryder*, 11 Paige, 187, that during the period that the mother is in fact *furnishing support* to the minor children she is entitled to their services; but that qualification would be fatal to the charge in the present case, which is unconditional and absolute that the mother had the absolute right to maintain the action during the minority of the child. . . .

. . . From the best consideration I have been able to give to the case I have come to these conclusions: 1. That the obligation of the mother, both by the common law and the statute, to support the minor children and the right to the custody of their persons and estate, is less comprehensive and perfect than that of the father, and that especially as to the custody of their persons it may be wholly divested by the testamentary

act of the father. 2. That the weight of authority in this State and country as well as in England, as well as the views of learned commentators on the law, rather incline against the existence of this right in the mother. . . .

THE "ETNA."

1838. 1 *Ware, U. S. District Court (2d edition)*, 474.

THIS was a suit brought by Edward Walker, a minor, who prosecuted by Joseph Walker, his father and next friend, for subtraction of wages. The libellant shipped, April 15, 1838, for a voyage from this port to Norfolk, and thence to various ports in the Southern States and back to Portland, where the vessel arrived August 31, when he was discharged. No shipping paper was signed, and there was no special agreement as to the amount of wages; and the parties disagreeing after the termination of the voyage, a libel was filed claiming under the Act of July 20, 1790, § 1, the highest rate of wages paid at the time. The libellant had been previously engaged in the "Grampus," another vessel belonging to the same owners, for a different voyage; but the mate of the "Etna" having absconded, he was, with his own consent, transferred from the "Grampus" to the "Etna," and forthwith sailed, leaving his clothing on board the other vessel.

The owner in his answer admitted the service, and stated that, not having the shipping paper in his possession, he was unable to state whether it was signed by the libellant or not, but alleged that he offered and tendered the wages at the rate of twelve dollars a month, which was as much as the libellant's service was worth, and brought the money into court. After the examination of several witnesses the cause was postponed, on the motion of the respondent, to give him time to procure the testimony of the master, and to ascertain whether the shipping paper was signed by the libellant. At the adjournment the master was not produced, nor any evidence offered with regard to the shipping paper, but the owners produced a receipt in full for the wages, by Joseph Walker, the father, and the respondent moved for liberty to withdraw his plea of tender, and to take back the money which had been paid into court.

S. Fessenden, for the libellant.

Haines, for the respondent.

WARE, District Judge. The first question, which is presented by the case, arises on the admissibility and effect of Joseph Walker's receipt in full for the wages claimed in the libel. It is said that the father, being entitled to the earnings of his child by virtue of his paternal power, and the wages being a debt due to him, in his own right, he had full authority to compromise and settle the suit on such terms as

he pleased, although the action was not brought in his name. As a general proposition, it is undoubtedly true that the father is entitled to the earnings of his children during their minority, nor is there any doubt that he may maintain a suit in the admiralty for their wages earned in a maritime service. *Plummer v. Webb*, 4 Mason, R. 380. But this is not, like the duties of a parent, a right which is indissolubly attached to the paternal relation. It is a right which may be either renounced by the father, or forfeited. He may renounce it by voluntarily allowing his child to have the exclusive use of the fruits of his own industry; and he may forfeit his right by neglecting to perform those parental duties which are the foundation of the right. It is the duty of the father to provide for his child a home, to protect, to maintain, and to educate him according to the measure of his ability. It is to enable him to do this that the law gives to him the custody and right of control over the person of his child; and, as some compensation for it, allows him to take the fruits of his child's labor. But this paternal power is not of the nature of a sovereign and independent power. It is subject to the restraints and regulation of law. Upon the principles of the law of nature, as well as of the municipal law of this country, it is inseparably connected with the parental obligations, and arises out of them. It is not a power granted to the parent for his benefit, but *allowed* to him for the benefit of the child, and it ceases when the faculties of the child have acquired that degree of maturity that it may safely be trusted to its own resources. When, therefore, the parent abuses this power, or neglects to fulfil the obligations from which it results, he forfeits his rights. If instead of treating his child with tenderness and affection, and bringing him up in habits of industry, sobriety, and virtue, he treats him with such cruelty that he cannot be safely left in his custody, or corrupts the purity and integrity of his nature, and trains him up to immorality and profligacy, the protecting justice of the country will interpose and deprive him of the exercise of a power which, having been allowed for the benefit of the child, is perverted to his injury and perhaps his ruin. There are many cases in which the Court of Chancery in England has interposed its authority and taken children from the custody of their fathers who have abused their parental power, and placed them under the care of persons proper to have the control of them, and to superintend their education. 2 Story's Eq. ch. 34; *De Manneville v. De Manneville*, 10 Vesey, 52; *Whitefield v. Hales*, 12 id. 492; *Wellesly v. Wellesly*, 2 Bligh, R. 128. I am not aware that any doubt exists that the courts in this country have similar authority. It would certainly be a great defect in the laws of any civilized people if they furnished no mode by which the innocence and helplessness of infancy, and the purity and ingenuousness of youth could be protected from the brutality of an unnatural parent. The community has a deep interest in preserving the rectitude of the young, and in imparting to them such an education and training them to such habits as will render them in manhood useful and not

pernicious members of society. As a father may forfeit his right to the custody and control of his child's person by abusing his power, so by neglecting to fulfil the obligations of a father, he may forfeit his right to the fruits of his child's labor. If he provides no home for his protection, if he neither feeds nor clothes him, nor ministers to his wants in sickness or health, it would be a most harsh and unnatural law which authorized the father to appropriate to himself all his child's earnings. It would be recognizing in fathers something like that pre-eminent and sovereign authority which has never been admitted by the jurisprudence of any civilized people, except that of ancient Rome, whose law held children to be the property of the father, and placed them in relation to him in the category of things instead of that of persons.¹

Keeping these principles in view, let us look to the facts in this case, as they have been proved by unexceptionable witnesses. A number of persons have been examined who have been acquainted with Joseph Walker and his family from one to four years or more, and who have testified to the kind of care which he took of his family, to his habits, his temper, and manner of life. During that time, although constantly residing in the same town, and his place of employment, where he worked at his trade, not being more than half a mile from the residence of his wife and children, he has never lived with them except in some portion of the winter season, when he was unoccupied in his trade. The witnesses testified that he never visited his family oftener than once a week, and seldom oftener than once a fortnight, when he came home on Saturday nights and spent Sunday. That on these occasions he often returned in a state of intoxication, when he abused his children with such excess that they have been seen, when their mother happened to be from home, flying from the windows to escape from his violence, and the younger ones have been taken by a family residing in another part of the house, to save them from the brutality of their father. That during this period he has done nothing towards the support of his children, except that he sometimes brought some small articles of provision into the family, but less, as the witnesses testify, than he himself consumed in these fugitive and unwelcome visits. The whole burden of providing for the family has been thrown upon the mother, who has labored to the full measure of her strength to provide a support for her children and herself, aided by a part of the earnings of such of the older children as could get employment. For this father, while he neglected all the duties of a father, was sufficiently tenacious of his supposed paternal power. When his son was at sea he took to himself a part of his wages, but he allowed a part to go towards the support of the child and the rest of the family. A few days after the son sailed on this voyage, having obtained the surplus money which was distributed among the inhabitants by the city government, he immediately, without allowing any part of it to his family, left this city,

¹ Note 1 omitted. — Ed.

and has not yet returned. The force of this testimony is but very slightly, if at all, weakened by that produced by the respondent, while so far as respects his habits of intoxication, it is fully confirmed by the unsuspecting testimony of a physician who has known him for eight years, and who testifies fully to his habits in this particular, and has been called to visit him while suffering under delirium tremens from habitual intemperance.

Is the father, under these circumstances, entitled as a matter of right to appropriate to himself the earnings of his son? At the time when he undertook to do it he had, as we have seen, abandoned his family. He left the place without giving them any notice of his intentions or his purposes, and they ascertained where he had gone, not from him, but by inquiries of others. The father is bound, as has been already observed, by the dictates of natural law, to support, protect, and provide for the well-being of his children, according to the measure of his ability. And if the law invests him with a right of control over their persons, it is only for the purpose of enabling him to perform more effectually and completely those duties which are enjoined as well by the instincts of nature and the dictates of reason as by the law of the land. The soundest and most approved expounders of the law of nature place the paternal power exclusively on this foundation. The creator of man, in giving to him a social nature and endowing him with those qualities which fit him for the enjoyment of social life, has imposed upon the parent, as one of the conditions of his being, the obligation of providing for his offspring while they are incapable of taking care of themselves. But his children are not on that account born slaves. They do not become the property of the parent. As soon as a child is born, he becomes a member of the human family, and is invested with all the rights of humanity. Nature has placed him under the tutelage of the parent, because this tutelage is necessary for his preservation and well-being, and has implanted in the bosom of the parent the instinct of parental love as a pledge and security for the faithful and pious execution of the trust; and, as wherever a duty is required, a grant of the powers which are indispensable for its performance is implied, the law of nature allows him just so much authority as is necessary for its execution. "The power of a father," says Puffendorff, "is that which is absolutely necessary to enable him to discharge the duties to his children which nature has imposed upon him, and consequently does not extend further than is requisite for this object." *Jus Naturæ et Gentium*, lib. 6, cap. 2, § 6; Grotius, lib. 2, cap. 5, §§ 1, 7; Locke, *Second Treatise on Government*, ch. 6; Heineccius, *Jus Naturæ*, lib. 2, cap. 3. The celebrated Hobbes, who seemed to think that children were born to no rights, as he resolves all right into that of the strongest, and who held that the relation of parent and child is that of master and slave, defends his doctrines, not on the simple fact of generation, or the relation of paternity and filiation, but on the fact that the child is indebted to the parent for protection, support, and

education, as it depended on his will whether he would nurture and maintain the child, or leave it to perish. If he abandons his child he abandons at the same time his paternal power, and the right of dominion over the child passes to the first person who takes it under his protection and gives it a support.¹

The municipal law of the country is founded upon and enforces the precepts of natural law; and the soundest and most esteemed commentators upon the common law explain the rights and duties of the parent in terms that correspond entirely with the dictates of the law of nature. "The power of parents over their children," says Blackstone; "*is derived from their duty*, this authority being given them partly to enable the parent more effectually to perform his duty, and partly as a recompense for his care and trouble in the faithful discharge of it;" and he adds, that the parent "may have the benefit of his children's labor while they live with him and *are maintained by him*." 1 Comm. 452, 453; Woodeson's Lectures, vol. i. 451. The language of Chancellor Kent, in his Commentaries, is, that "in consequence of the obligation of the father to provide for the maintenance and, in some qualified degree, for the education of his infant children, he is entitled to the custody of their persons, and the value of their labor and services." 2 Kent's Commentaries, 290; Reeve's Domestic Relations, ch. 9, p. 283, ch. 10, p. 290; *Plummer v. Webb*, 4 Mason, Rep. 382; *Benson v. Remington*, 2 Mass. Rep. 113; *Day v. Everett*, 7 id. 145. It may be true that the paternal power is sometimes described in terms more general, for men who are most accurate in the use of language do not always, whether in speaking or writing, annex to a general truth all the limitations and qualifications with which it is to be understood. It is perfectly true, as a general proposition, that the father has the right to the custody and control of the person of his child; and it is equally true that if he abuses this power the law will interpose and take his child from him. What degree of abuse will justify or require this interposition is necessarily a question of discretion; but no one will contend that a father, under the common law, stands in the relation of a sovereign to his child, invested, like a Roman father, with the *jus vitæ et necis*. So also it is not questioned, as a general truth, that the father is entitled to the fruits of his child's labor; but it is equally true that this is a right which results directly from the fulfilment of his paternal obligations of providing for the well-being of his child. If these duties are not performed, if he abandons the care of his children, he renounces at the same time his paternal power. There is, as is justly observed by Chief Justice Parker, no law, human or divine, short of that of absolute slavery, which can authorize the father to take to himself the fruits of his child's industry when he has discharged himself from the obligation to support the child, or has obliged him to support himself. *Nightingale v. Withington*, 15 Mass. Rep. 274; per Sedgwick, Justice, 2 id. 115.

¹ Note 2 omitted. — Ed.

But there is proof, in this case, that the father was, from infirmity, unable to perform the ordinary labor of a man, having had the misfortune to lose one of his legs. Now it is not intended to be said, when a parent from sickness or any other cause becomes unable to support his children, that they are discharged from the obligation of filial piety and reverence. These are obligations which follow them through life; and these sentiments are so deeply implanted by nature in the human bosom that, ordinarily, no degree of neglect or unkindness on the part of a parent can entirely extinguish them. Nor is it pretended that this obligation is fully discharged by cherishing passive feelings of gratitude and affection for a parent. When a child has arrived at that degree of maturity and strength that he is able by his industry to do more than is necessary for his own support, nature imposes on him the obligation of contributing to the support of a sick or infirm parent. Provision is made by the laws of this State for enforcing the performance of this natural obligation. Laws of Maine, ch. 122, § 5. But neither the law of nature nor the law of the State applies in favor of a parent who, being able to support himself, as this one was, and to contribute something at least to the well-being of his family by the exhibition of feelings of paternal kindness and solicitude for their welfare, if in no other way, in the first place disturbs and disquiets them by the abuse of his paternal power, and then abandons them to the care of themselves and to the charity of their neighbors. In whatever light this case is viewed, it appears to me that Joseph Walker had neither a moral nor legal right to appropriate to himself the libellant's wages. If the payment then to him is a discharge of the suit, it must be on some other ground than that of his paternal prerogative of receiving them to his own use.

Is his discharge valid and conclusive on the rights of the minor if he be considered as acting in the character of *prochein ami*?

[The learned Judge answered this question in the negative.]

ATWOOD v. HOLCOMB.

1872. 39 *Connecticut*, 270.

TROVER, brought to the Court of Common Pleas of Hartford County, and tried on the general issue, with notice, closed to the court, before Briscoe, J. Judgment for the plaintiff and motion for a new trial by the defendants. The facts are sufficiently stated in the opinion.

Perkins, with whom was *W. C. Case*, in support of the motion.

The gift of the father to the son, of the avails of his labor thereafter, was not valid as against those who were creditors of the father at the time. It is too well settled to need citation of authorities that an in-

solvent debtor cannot make a gift which will be valid as against existing creditors. It is also well settled that the policy of our law favors an appropriation of *all* available means of the debtor, of every kind, for the payment of his debts. *Ensworth v. Davenport*, 9 Conn. 393; *Remington v. Cady*, 10 id. 47; *Davenport v. Lacon*, 17 id. 281; *Bray v. Wallingford*, 20 id. 409. All questions arising of this kind are to be so answered as to favor this appropriation. If the son had already worked, and wages were due to the father, there can be no question but that a gift of them would be void as against existing creditors. Why should any distinction be made between a gift of wages due, and those to become due? The father has a *right* to the wages of his minor child. They are just as much his as his own wages, or those of his wife, as much as the avails of the labor of his hired man, his oxen or his horses. If these wages are due, a creditor may attach them. By emancipating his son, therefore, the father deprives his creditors of property, which they have a right to avail themselves for the payment of their debts. Creditors may trust a man expressly on the ground that he has many children whose wages are available as his own to meet their claims. This would be especially so when the debts are incurred for articles of food and clothing for the family. It may be said that perhaps the children will not work if their wages go to pay their parents' debts. But parents have a right to *make* their children work. If they do not, the selectmen can make them. Rev. Stat. p. 308, §§ 43, 44, 45. This argument would apply just as much to the labor of the man himself, his wife, or his hired man. The probability of a child's or a man's working does not change the legal rights of the parties. The authorities hold that such a gift is void. Reeve in his treatise on Domestic Relations says (p. 423) "The father can no more give to the child the avails of his service to the prejudice of his creditors, than he can any other property." *Chase v. Elkins*, 2 Verm. 290; *Bray v. Wheeler*, 29 id. 514; *Jenney v. Alden*, 12 Mass. 375; *Winchester v. Reid*, 8 Jones (Law), 377.

Goodman, contra, cited *Welton v. Morse*, 6 Conn. 547; *Torrington v. Norwich*, 21 id. 543, 547; Reeve's Dom. Rel. 422, note; *Jenison v. Graves*, 2 Blackf. 440; *Chase v. Elkins*, 2 Verm. 290; *Chase v. Smith*, 5 id. 566; *Rush v. Vought*, 55 Penn. S. R. 437; *McCloskey v. Cyphert*, 27 id. 220; *Holdship v. Patterson*, 7 Watts, 547; *Bray v. Wheeler*, 29 Verm. 514; *Nightingale v. Withington*, 15 Mass. 272, 275; *Corey v. Corey*, 19 Pick. 29.

SEYMOUR, J. This case was tried in the Court of Common Pleas and judgment there given for the plaintiff. The defendants seek for a new trial. In their brief the defendants' counsel state the facts thus: —

On the 23d of March, 1867, the plaintiff was indebted to the defendant Holcomb and was insolvent. He had a son, Arthur, seventeen years of age, and on that day gave him a letter of emancipation, by which he agreed that his services and future earnings, which then belonged to the plaintiff, should belong thereafter to the son. There was no

consideration whatever for this gift. In September of that year Arthur negotiated for the purchase of a colt with one Hays, who completed the sale with the plaintiff's wife, and conveyed the title to her in the same month. She paid therefor five dollars of her own, and Arthur thereafter caused \$22.50 of his wages, earned after the date of the letter of emancipation, to be paid as part payment for the colt. This colt was afterwards exchanged for a horse. The defendants caused this horse to be attached in a suit against the plaintiff, and the plaintiff brings trover as trustee for his wife.

Upon these facts the defendants' counsel make the question, Was the gift of the father to the son, of the avails of his labor thereafter, a valid one as against those who were creditors of the father at the time? On examining the record it does not distinctly appear that the debt of the defendant Holcomb was prior in time to the letter of emancipation, but from what was said by counsel in the discussion we suppose in truth it was prior, and shall decide the case upon that as being the fact. In regard to the insolvency of Mr. Atwood, the father, the finding is that at the time of the attachment he was, and for many years previous had been, shiftless and unable to pay his debts.

If the obligation of a minor child to labor for his father is in the nature of an ordinary debt and properly a thing in action like a bond or promissory note, the argument of the defendant would have full force, that the father must be just before he is generous, and could no more forgive to his son the obligation of personal service, to the prejudice of creditors, than he could give away a valuable bond. But there are differences between an ordinary debt and a child's obligation to serve his father. If Mr. Atwood had died insolvent on the day of the date of the letter of emancipation, the law itself would have done for the son what the father attempted to do. The law would have given the son his time, and his earnings would thereafter have been his own. Neither the defendant nor any other creditor of the father would have any claim on the son that he should labor for the benefit of his father's estate. This duty of service is not assets like a bond in the hands of an administrator for payment of debts, nor for any purpose. So too in case of bankruptcy it is clear that the father's right to his children's services does not pass as assets for the benefit of creditors to the assignee in bankruptcy. The son therefore is not in law regarded as an ordinary debtor to his father, nor is the father's right to the son's services regarded in law as mere property either in possession or in action. The right and the duty are in the main personal, and are founded on the intimate relation that during minority must necessarily exist between the parties. The age of twenty-one years is fixed by law as the utmost period of the relation, but it may be terminated before that period by the mutual agreement of the parties, so as to put an end to the duty of personal service. This was decided in *Welton v. Morse*, 6 Conn. 547. The law wisely permits the father to consult the genius, capacity, and inclination of his son, and if he thinks it best that his

child should be stimulated to industry by receiving the fruit of his own labor, or best that he should before twenty-one be put upon his own resources to earn a living, he may by law anticipate the usual period of majority and release to him all claim upon his earnings.

The father by statute, with the minor's consent, may bind his son as an apprentice to learn a useful trade, thus transferring to the master the right of service. And in such case the practice is to give to the minor child the whole benefit of his labor, either in instruction or in board and clothing, and if a sum of money is to be paid at the end of the apprenticeship by the master it is usual and we suppose universal to stipulate for its payment to the son himself and not to the father. Chamberlin's Commercial Law, 377, 846. Now by such indentures of apprenticeship the father relinquishes to the son the benefit of the son's service, and the father's creditors may be affected by it as much as the creditors of Mr. Atwood are affected by the emancipation in the case before us. But we think the law does not permit creditors to control the father's freedom in the important matter of dealing with his son's time and employment as the best interest of his son may seem to require. By the law of nature every person is entitled to the fruit of his own labor and skill. Municipal law which gives to the father the earnings of his children during their minority, does not intend to contravene this law of nature, but merely to modify it, giving to the father the control of his children's earnings as the means of providing for their maintenance and education, under the idea that the father is more capable than the child to direct his industry and supply his wants, and under the further idea that the parent will use his power with paternal regard for the best interests of his child, and not as a mere means of profit to himself. Hence, it is settled law that if the father abandons the child and leaves him to provide for himself, the child becomes entitled to his earnings as a means of support, and the father has no claim upon them to reimburse himself for past expenses incurred in infancy. *Nightingale v. Withington*, 15 Mass. 272. So too by marrying during minority a daughter is freed from all legal obligation to labor for her father.

If therefore by mutual consent a child is emancipated before arriving at the age of twenty-one, and is left to provide for himself under an agreement that his time shall be his own, we think the father's creditors have no ground to complain of the arrangement. The father relinquishes nothing which was intended as a source of profit to him, he merely remits his son to his natural rights at an earlier period than that fixed by law. If however such arrangement is merely colorable, — a mere sham to protect the son's wages from creditors, while as between the parties the father still is to control and have the benefit of them, — then the transaction is void as against creditors. So too after wages are actually earned before emancipation, the gift of such wages or their proceeds to the son would be subject to the ordinary rules which govern voluntary conveyances of property. Probably Judge Reeve had such a

case in his mind when he penned the sentence in his valuable treatise on domestic relations on which the defendants rely. The case before us relates to wages earned by the son after he had been emancipated, after he had reason to suppose that he was laboring for himself under an arrangement which appears to have been proper under the circumstances and made in good faith.

The father was shiftless and unable to pay his debts. Such instances are unfortunately too common, where the head of the family fails to provide comfortably for the household and is discouraged by the burden of debt from attempting much to improve his own condition or that of his family. In this state of things a son seventeen years of age proposes to start for himself and with his own earnings to provide his own food, raiment, and education. The father consents, and the son by the labor of his own hands earns a few dollars, and we are called on to decide between the son's title and that of his father's creditors to these earnings. In a case somewhat analogous, of the wife's earnings, which at common law belong to the husband, our statutes have carefully protected the proceeds of her labor from her husband's creditors and secured them to her own use. The statutes proceed upon the same principle of natural law and justice which we feel bound to apply to a child's wages, in cases like the present. Those statutes however go much further in the protection of the wife's earnings than we are called on to go in favor of a child's, for as already stated the son's wages earned before emancipation are regarded as his father's property, and of course like other property are liable to attachment.

We have carefully examined the authorities cited by the counsel for the defendants, but we find no case which favors their claim, and though perhaps no case has gone the full length claimed by the plaintiff, yet the language of the judges in Massachusetts, Vermont, and Pennsylvania is in conformity with the views which we have expressed; and both on principle and authority we think the decision of the Court of Common Pleas was correct, and we therefore advise no new trial.

In this opinion the other judges concurred.

WHITE v. HENRY.

1845. 24 *Maine*, 531.¹

ASSUMPSIT to recover the wages of a minor son of the plaintiff for the term of three months and twenty days, commencing on Oct. 28, 1843, as a seaman on board a vessel belonging to the defendants.

The services were performed, and the defendants proved payment therefor to the son, and contended that this was a discharge from the father.

¹ Arguments omitted. — Ed.

The defendants at the time of making the contract knew that the son was under age. The plaintiff did not know of the intention of the son to go to sea, nor of his having shipped until after he had sailed. The plaintiff had always supplied his son with the means of support so long as he would stay with him. The son was married in 1842, against his father's wishes, and without his consent, and contrary to his direction, having gone secretly into the State of Connecticut for that purpose, because his father would not permit him to marry here. The plaintiff has never expressly or impliedly given his assent to the marriage, but has always been ready and willing to support his son in a manner becoming his degree and station in life. The son, however, has declined to live with his father, and has lived with his wife, having no children, when not at sea.

If the plaintiff was entitled to recover, the defendants were to be defaulted, and judgment was to be entered for the amount of the wages, at fourteen dollars per month; and if not, the plaintiff was to become nonsuit.

Haines, for plaintiff.

Mitchell, for defendants.

TENNEY, J. It is a general principle, well settled, that parents are under obligation to support their minor children, and that they are entitled to their earnings. When a contract between the parent and child exists, that the latter shall enjoy the fruit of his labors, or when the parent neglects to support him, the rule will not apply. If the father, or person having the care and control of the minor, should consent to his marriage, this may be another exception to the principle, so far as his earnings are necessary for the support of his wife and children; for the consent to the marriage may imply a consent that he should, from his earnings, have the means of discharging his new obligations.

The statute requires that when a male under the age of twenty-one years is to be married, the consent of the parent, guardian, or other person having the care or government of such party within the State shall be obtained before marriage. Rev. Stat. c. 87, § 7. We cannot believe that the violation of an express provision of law can secure to a minor, who is guilty thereof, a privilege which he would not otherwise possess, and constitute another exception to the general law.

If the son is not entitled to his earnings, a payment to him of their value by his employer (without the consent of the father, express or implied), knowing his minority, cannot deprive the father of the right to recover a just compensation for the labor, of which he has been deprived without his own fault or neglect.

The case at bar finds that the son, whose wages are claimed in this action, refused to live with his father, who provided everything necessary for his comfort and convenience. He went away without the knowledge, and married against the will and express direction, of his father. The father has in no way consented that he should have his earnings, but has always been ready and willing to support him in a

manner becoming his degree and station in life. The defendants, knowing that he was a minor, without the knowledge or consent of his father, employed him as a seaman, and have paid him his wages in full.

To allow this defence to prevail would hold out encouragement to sons, impatient of parental control, while in their minority, to resist the reasonable authority of their fathers, and give the latter little means to secure their own legal rights beyond the exercise of physical restraint; would offer inducements to youth to enter into improvident and ill-advised marriages, which maturer years would cause them to regret and deplore.

It is insisted that the defendants were authorized to suppose that the son's marriage was by the father's consent. The father could not be deprived of that, which was his own, when no negligence was imputable to him, and the defendants, by the knowledge of the son's minority, could have informed themselves of the facts before they made payment to him.

Defendants to be defaulted, and judgment to be entered at the rate of \$14 a month for the time the son was employed, and interest from the date of the writ.

ALDRICH v. BENNETT.

1885. 63 *New Hampshire*, 415.

CASE, for unlawfully enticing away the plaintiff's minor daughter, on the 29th day of March, 1879, and depriving him of her services from that time until the 8th day of September, 1882, when she became twenty-one years of age. The defendant pleaded that on said 29th day of March he was lawfully married to the daughter, and that the plaintiff was not thereafter entitled to her services. To this plea the plaintiff demurred.

Lane & Dole, for the plaintiff.

Batchelder & Faulkner, for the defendant.

CLARK, J. The right of a parent to the earnings of his minor child, upon whatever principle it is founded (*Hammond v. Corbett*, 50 N. H. 501), is commensurate with the right of custody; and so long as the right to the services of the child remains, the right to control those services must exist. Whatever, therefore, operates as a release from parental control, necessarily terminates parental right of service; and the emancipation of the minor from legal parental authority, either by the voluntary act of the parent or by operation of law, puts an end to the legal claims of the parent to the minor's earnings.

The marriage of a female infant, if above the age of legal consent, is valid, although contracted and entered into in defiance of parental

wishes and authority. G. L., c. 180, §§ 13, 14; *Parton v. Hervey*, 1 Gray, 119. Being valid, the same legal consequences must follow from it, whether contracted in obedience to parental preferences, or in opposition to them. In either case the parent is no longer entitled to the services and earnings of the infant married daughter. The new relations created by the marriage, being inconsistent with the enforcement of parental rights, operate as an emancipation from them. The plaintiff's daughter, being above the statutory age of consent, had the legal capacity to form the relation of marriage, and although in strictness of law it should not be formed without parental consent, it is nevertheless sustained on grounds of public policy, and parental rights are made to yield to it. Cooley, Torts, 237. The legality of the marriage is admitted by the demurrer, and the plea is a sufficient answer to the plaintiff's action. *Hervey v. Moseley*, 7 Gray, 479.

Demurrer overruled.

CARPENTER, J., did not sit; the others concurred.

FIELD, C. J., IN COMMONWEALTH v. GRAHAM.

1892. 157 *Massachusetts*, 73, pp. 75-76.

FIELD, C. J. . . . The real question is whether, when a minor son marries without the consent of his father, and the father never consents to it, and needs the son's wages for his support and the support of his family, the father is entitled to the son's wages during minority in preference to the wife, who also needs the wages for her support. The ruling was, that the "wife would be entitled to receive support from" her husband, and that he "would be entitled as of right to such portion of his wages as to enable him to support his wife; that the father could only claim the rest."

It seems to be settled that the marriage of a minor son, with the consent of his father, works an emancipation, and it is not clear that the marriage of a minor son without his father's consent does not have the same effect, although the decision in *White v. Henry*, 24 Maine, 531, is *contra*. It has been said: "The husband becomes the head of a new family. His new relations to his wife and children create obligations and duties which require him to be the master of himself, his time, his labor, earnings, and conduct." *Sherburne v. Hartland*, 37 Vt. 528, 529. There seems to be little doubt that, when an infant daughter marries, she is emancipated from the control of her parents. *Aldrich v. Bennett*, 63 N. H. 415; *Burr v. Wilson*, 18 Tex. 367; *Porch v. Fries*, 3 C. E. Green, 204; *Northfield v. Brookfield*, 50 Vt. 82; *Rex v. Wilmington*, 5 B. & Ald. 525; *Rex v. Everton*, 1 East, 526. See, however, *Babin v. Le Blanc*, 12 La. An. 367. The mean-

ing of emancipation is not that all the disabilities of infancy are removed, but that the infant is freed from parental control, and has a right to his own earnings. In *Taunton v. Plymouth*, 15 Mass. 203, 204, it was intimated that the marriage of an infant son with the consent of the father entitled the son to his own earnings for the support of his family, and in *Davis v. Caldwell*, 12 Cush. 512, it was said that an infant husband is liable for necessities furnished for himself and his family. It is clear, we think, that it is the duty of an infant husband to support his wife, and that, if he have property and a guardian, it is the duty of the guardian to apply the income, and, so far as is necessary, the principal of his ward's property, to the maintenance of the ward and his family, under the Pub. Sts. c. 139, § 30.

We are of opinion that these considerations make it necessary to hold that an infant husband is entitled to his own wages, so far as they are necessary for his own support and that of his wife and children, even if he married without his father's consent, and that the ruling of the court was sufficiently favorable to the defendant. Whether sound policy does not require that, in every case in which the marriage is valid, an infant husband should be entitled to all his earnings, need not now be decided.

CHAPTER V.

ACTION FOR SERVICES RENDERED BY ADULT, OR EMANCIPATED, CHILD TO PARENT; AND *VICE VERSA*.

MUNGER v. MUNGER.

1856. 33 *New Hampshire*, 581.

ASSUMPSIT, for the labor and services of the plaintiff from March 1, 1851, to March 1, 1854. At the August term, 1855, of the Common Pleas for this county, the action was referred to a commissioner, who, at the February term, 1856, reported as follows:—

“1. That the plaintiff, who is the daughter of the defendant, and was on the 1st day of March, A. D. 1851, more than twenty-one years of age, lived, labored, and rendered services in the family of the defendant, with his knowledge and consent, from the 1st day of March, A. D. 1851, to the 1st day of March, A. D. 1854.

“2. If the plaintiff is entitled to recover on the foregoing facts, I find that the services of the plaintiff were worth to the defendant the sum of one hundred and fifty-six dollars, and I assess damages in the sum of one hundred and fifty-six dollars.”

Thereupon, the questions arising upon the commissioner's report were transferred and assigned to the determination of this court.

Geo. Ticknor, for the plaintiff.

Snow and Williamson, for the defendant.

FOWLER, J. The fact that a child continues to live with a parent after becoming of age, or returns to live with him, after being for a time absent, and becomes one of the family, does not ordinarily constitute the relation of debtor and creditor between them, so as to warrant a charge on the part of the parent for the board of the child, or on the part of the child for such services as are usually performed in a family by a child living with its parent. In such case, it is incumbent on the child to show that the services which are the foundation of the claim were rendered with an expectation on the part of the child of receiving compensation therefor, and that this expectation was understood by the parent at the time the services were rendered, or that he had sufficient reason at the time to believe that the child expected to

make him a debtor for such services. *Fitch v. Peckham, Ex'r*, 16 Vt. 156.

A child of full age, working for his parents without a stipulation for wages, cannot recover them by a suit. *Willis v. Dun, Wright*, 134.

A child is not entitled to recover wages for services rendered for his parent, except upon clear and unequivocal proof, leaving no doubt that, at the time of the services rendered, the relation subsisting between the parties was not that of parent and child, but of master and servant. *Candor's Appeal*, 5 Watts & Serg. 513.

Where a son, after his majority, continues to remain with his father, and renders such services as he was accustomed to render before he became of age, but without any agreement on the part of the father to pay for them, the law implies no obligation on him to pay for such services. *Reser v. Johnson*, 1 Smith (Md.), 81.

A son who works for his father after he is of age does not thereby acquire a right of action against the father, unless the father has previously agreed to pay him for such work. *Zerbe v. Miller*, 4 Harris (16 Pa. State), 488.

Where a daughter, who was of age, remained in her father's family as housekeeper for four years after her mother's death, and her father, after the daughter's marriage, said to third persons that "she had never been paid," and that "he meant to give her an outfit," but there was no evidence of a special contract before or during the service, it was held, in the absence of all proof of a contract, that it was to be presumed that the daughter had remained an unemancipated child, and therefore not entitled to wages, and that the declarations of the father, as they referred to no precedent debt, nor period of service, did not amount to a promise to pay on an implied contract. *Ridgway v. English*, 2 New Jersey, 409.

Such is believed to be the uniform current of authority on the only question involved in this case, and the decisions settle it decisively against the right of the plaintiff to recover. They seem to be all based upon the principle, believed to be equally sound and salutary, that where the relation of parent and child is shown to exist, the law will not presume any other; that in order to establish the existence of the inferior relation of master and servant, or debtor and creditor, between a parent and child, at any given period, there must be proof, more or less strong, but sufficient to carry conviction, that the parties understood the inferior relation to subsist between them at the time, and acted with reference to it. Nothing of that kind is shown in the present case. The report of the commissioner finds simply that the plaintiff lived, labored, and rendered services in the family of the defendant, her father, from March 1, 1851, to March 1, 1854, a period of three years, with the knowledge and assent of the father, the plaintiff during the whole period being more than twenty-one years of age. It fails to find any contract of service between the parties, any expectation at the time on the part of the plaintiff that she should receive compensa-

tion for her services, or any agreement of the father, express or implied, to render such compensation.

Under these circumstances, it is very clear that the plaintiff cannot maintain her action, and there must be

Judgment for the defendant on the report.

PUTNAM, ADMINISTRATOR OF LAURA PUTNAM, v. TOWN,
EXECUTOR OF JABEZ TOWN.

1861. 34 Vermont, 429.¹

APPEAL from the decision of commissioners upon claims against the estate of Jabez Town. The plaintiff's claim was for services rendered to the testator, Jabez Town, by his daughter, Laura Putnam, the plaintiff's intestate, after she became of age, and while she remained a member of her father's family. The plaintiff introduced evidence tending to prove an agreement by Jabez Town that the plaintiff's intestate should be paid for such services out of his estate after his death, and the defendant introduced testimony tending to show that there was neither any express agreement by the father nor any understanding between him and his daughter, that she was to be paid for such services. The charge of the county court to the jury relative to the plaintiff's claim is sufficiently recited in the opinion of the court. To this charge the defendant excepted. . . .

O. H. Smith and T. P. Redfield, for the defendant.

Peck & Colby, for the plaintiff.

ALDIS, J. The court charged the jury that the burden was on the plaintiff to satisfy them, by a fair preponderance of evidence, that there was a contract or mutual understanding between said Laura and her father, in pursuance of which she rendered the services, and was to be paid for them in addition to the support she received while remaining in his family; also, that as the services were rendered by Laura while continuing to reside in her father's family after she was of age, and while receiving her support, and without account or charge between her and her father, no promise to pay for such services could be implied from such relation between them, but the promise must be found from evidence tending to show an express promise or mutual understanding of the parties that the services should be paid for.

It is claimed by the defendant that in cases of this kind it is not enough that there should be a fair preponderance of the evidence to sustain the claim, — but that the proof should be full and plenary, unequivocal and conclusive.

Suits of this character are not unfrequently brought after the death of the parent; often a considerable period of time has elapsed after the

¹ Part of case omitted. — ED.

services were rendered, and before the claim is made. No accounts have been kept between the parties. These circumstances have led the courts to regard such claims with suspicion. Hence it has sometimes been said when such suspicious cases have pressed hard upon the court that such claims ought to be proved by unequivocal acts, and not by loose and idle declarations. 5 Watts & Serg. 515. But we do not understand that the courts of this State have altered or intended to alter the rule of the common law, — that a fair balance of proof, a fair preponderance of the evidence for the plaintiff, will enable him to sustain his case. On the contrary, in the very recent case of *Davis v. Goodenow*, 27 Vt. 715, Judge Redfield, in referring to the case in 5 Watts & Serg. 515, says that that case seems to require more than the amount of proof usually required. That case (*Davis v. Goodenow*) was recommitted to the auditor that he might report whether it was satisfactorily shown to him, that the parties expected at the time the services were rendered, that the plaintiff should have wages; but no instruction was given that the ordinary rule as to the amount of proof required to satisfy him should be departed from.

The case of *The Adm. of Way, Jr., v. The Estate of Way*, 27 Vt. 627; of *Andrus et ux. v. Foster*, 17 Vt. 560; and of *Fitch v. Peckham's Ex'x*, 16 Vt. 150, all evidently stand upon that principle. These cases have established the important principle that where the relation of parent and child exists, and the child after coming of age, and while in the parent's family, renders services and receives support, the law will not imply, from such relation and the rendering of such service, that there was a contract either that the services of the child or the support furnished by the parent should be paid for. In ordinary cases, when the relation of parent and child or one similar to it did not exist, the law would imply that such service was to be paid for; but where such relation exists the law presumes the service to be rendered, and the support to be furnished voluntarily and without any expectation of payment by either party. Hence in such cases there must be proof, either of express agreement for pay, or of such facts and circumstances as satisfactorily and fairly show that both parties at the time expected and understood that the services were to be paid for. If the evidence tend to show this, then it is for the auditor or the jury to show whether it does show it. In the case at bar we think the evidence legally, though perhaps slightly, tended to show a contract. The charge of the court adopted the settled rule of law applicable to such cases. We find no error in the charge: If there was error in the verdict of the jury it is not for us to correct it.

[Omitting opinion on another point.]

Judgment affirmed.

HALL v. HALL.

1862. 44 *New Hampshire*, 293.

ASSUMPSIT, for services rendered by Cynthia Hall, one of the plaintiffs, to her father, the defendant's intestate, in his family, from November, 1852, to March 21, 1857. The said Cynthia was of age March 4, 1857. On the 21st day of March, 1857, she married the said Isaac, and left her father's house. The defendant filed a confession of her claim from the time she became twenty-one years of age to said 21st of March, and pleaded the general issue as to the residue.

For the purposes of this case it was admitted that in January, 1852, the deceased gave the said Cynthia her time and future services, in writing, which writing was published in the "Dover Gazette" on the 17th day of January, and on the two following weeks; a copy of which is as follows:—

TIME GIVEN.

This may certify that I have this day given to my daughter, Cynthia Hall, her time henceforth, and she is free to act and trade for herself. I shall not claim any of her earnings, nor pay any debts of her contracting after this date.

WILLIAM HALL.

BARRINGTON, January 14, 1852.

Witness—JOHN T. GIBBS.

Soon after that time Cynthia left her father's, and was employed elsewhere, receiving her own earnings to her own use. Previous to November, 1852, while she was at work in another town for herself, the deceased requested her to come home and work in his family, and promised her, if she would do so, he would pay her as much as she could earn elsewhere. Whereupon she came home, and, with some intermissions, worked in her father's family till said 21st day of March.

Whether upon these facts the plaintiffs are entitled to recover for the services of said Cynthia, before she became twenty-one years of age, the parties agreed to submit to the determination of the court; and if the court shall be of opinion that the plaintiffs have no right to recover for last-named services, judgment is to be rendered for the plaintiffs for the amount confessed, and for the defendant for his costs from the date of his confession. But if the court should adjudge otherwise, then this case is to be discharged, and the action stand for trial on said issue.

T. E. Sawyer, for the plaintiffs.

[Argument omitted.]

C. W. Woodman, for the defendant.

We do not controvert the doctrine that a parent may relinquish to the child his time and the profits of his labor performed for others; but we maintain the right of the father to resume that time, and to demand the personal services of the child thereafter during minority. In the

case cited by the plaintiff, *Regina v. Smith*, 16 E. L. & E. 221, such right of the parent is distinctly asserted.

The defendant represents the parent, and has the right to set up any defence which the parent would have if the action had been against him ; and he contends that the promise of the intestate to the plaintiff, Cynthia Hall, was without consideration, and that no action will lie upon it. By her return to his house and laboring there he got what belonged to him — what he had a right to claim. As against him she parted with nothing which she had a right to retain. To the father belong the earnings of the child during her minority, and upon him rests the duty of supporting her. Being bound to support her, he could resume control over her person and her services at his pleasure as against her. The gift of her time is voluntary, and, in view of the peculiar relations and duties of parent and child, must be construed only as a permissive indulgence, to continue so long as the father deemed it prudent and proper, but to cease whenever his own interest, or the interest of his child, should so require. The emancipation is solely for the protection of strangers, who employ and pay the child.

BELL, C. J. A father may, by agreement with his minor child, relinquish to the child the right he has to his services and earnings, and he will afterward have no right to claim his wages from his employers, but the child may claim and recover them in his own name for his own benefit. *Jenness v. Emerson*, 15 N. H. 489 ; *Jenney v. Alden*, 12 Mass. 375 ; *Withington v. Nightingale*, 15 Mass. 274 ; *Corey v. Corey*, 19 Pick. 30 ; *Wood v. Corcoran*, 1 Gray, 405 ; *Chase v. Elkins*, 2 Vt. 290 ; *Chase v. Smith*, 5 Vt. 556 ; *Morse v. Welton*, 6 Conn. 547 ; *Whiting v. Earle*, 3 Rich. 201 ; *Stiles v. Granville*, 6 Cush. 158 ; *Jennison v. Graves*, 2 Blackf. 441 ; *Burlingame v. Burlingame*, 7 Cow. 92.

Such an agreement operates as a release of the father's right, and he has no power to reclaim or resume it afterward : *Preston, Touchstone*, 307 ; *Litt.*, sec. 467 ; nor will his right revive, unless from the actual agreement of the minor or one fairly inferable from the circumstances and conduct of the parties.

An agreement of the father with his son stands on different ground from his agreement with a third person, to give up to him the control of his child for a limited time, or during his minority. As between them the right of the father over his child has been held a personal trust, which cannot be transferred unless by indenture under the statute, and which it has been held the father may therefore resume at his pleasure : *Regina v. Smith*, 16 E. L. & E. 221 ; *People v. Merwin*, 3 Hill, 399 ; *Mayne v. Baldwin*, 1 Halst. 454 ; *State v. Clover*, 1 Harr. 419 ; though upon this point the decisions do not all agree : *State v. Smith*, 6 Greenl. 462 ; *Pool v. Gott*, 14 Law Rep. 269 ; *Matter of Mitchell*, R. M. Charl. 489 ; *Commonwealth v. Gilkeson*, Hurd, Hab. Corp. 543.

The agreement to sell or give to a child his time, and to relinquish to him all right to his services or earnings, affords no foundation for the

usual concluding portion of the published notices, in which the father declares that he will pay no debts of the child's contracting. As a notice that the father has revoked all power of the son to contract on his account it may be valid, and any person who should contract with him, as an agent of his father, would do so at his peril, and the father generally would not be liable. But the duty imposed by law upon the father to maintain his minor child in case of his inability to maintain himself, rests on considerations of public policy, looking to the protection of the community, and it cannot be renounced at his pleasure, nor the burden transferred to one who is not deemed in law generally competent to contract, nor capable of performing such a duty. *Pidgin v. Cram*, 2 N. H. 353; *Hillsborough v. Deering*, 4 N. H. 95; *Jenness v. Emerson*, 15 N. H. 488.

Under an agreement to give a son his time the father may contract to employ and pay him, or to hire him to labor for himself, and he will be equally bound as a stranger, and the son may recover his wages of him by a suit.

If, then, in the present case the father employed his daughter, to whom he had released his right to her services, and agreed to pay her wages for her labor, he and his estate are bound by the contract, and the daughter may well maintain her action.

The case, then, turns upon the question, whether there was an agreement between the deceased and his daughter that she should render her services, not as a daughter, but as a hired servant, and that she should be paid for her services as such, either wages at a certain rate, or a just and reasonable compensation, payable at all events; a question proper for the consideration of a jury.

Upon the statement made, we cannot decide the case without determining these questions of fact, and in doing so we have to consider certain other legal principles.

The minor who is released from his father's service stands, as to his contracts for labor, either with strangers or with him, in the same position, as to this question of fact, as he would do if he had arrived at full age. *Steel v. Steel*, 12 Penn. St. 64.

Generally, where one man performs services for another at his request, or with his knowledge and without objection, the law implies a contract on the part of the person receiving the benefit of the service, to pay a reasonable compensation for it. 1 Pars. Con. 530; *Phillips v. Jones*, A. & E. 333; *James v. Bixby*, 11 Mass. 34; *Farmington Academy v. Allen*, 14 Mass. 172; *Guild v. Guild*, 15 Pick. 130; *Lamb v. Bunce*, 4 M. & S. 275. But this rule does not apply where it appears that the service was intended and understood to be gratuitous, or without expectation of payment. *Newell v. Keith*, 1 Vt. 214; *Bartholomew v. Jackson*, 20 Johns. 28; *Griffin v. Potter*, 14 Wend. 214; *Livingston v. Ackeston*, 5 Cow. 532.

Among the cases of the last description is the case of children of any age, residing with and making part of the family of their father. In such cases the presumption of law is that the services rendered on the

one side, and the board and supplies furnished on the other, are gratuitous, and that payment for them is neither expected nor promised. This presumption may be met by direct proof of an express promise or agreement by the father to pay wages for the services of his son or daughter, or by the son or daughter to pay for their board, or such supplies as they receive; but loose talk is hardly regarded as evidence of such an agreement sufficient to rebut the legal presumption. There must be proof of a bargain, negotiated and concluded on both sides, and the mere assurance that the son shall be well used, or shall not be a loser, &c., is not regarded as evidence of such a contract.

The legal presumption may still be met by proof of such circumstances, connected with their dealings with each other, as fairly warrant the inference that it was the understanding and expectation of the parties on both sides that such services and supplies were to be paid for as a debt. *Fitch v. Peckham*, 16 Vt. 150; *Andrews v. Foster*, 17 Vt. 556; *Williams v. Hutchinson*, 5 Barb. 122; *Dyer v. Kerr*, 15 Barb. 444, and cases cited; *Ridgeway v. English*, 2 N. J. 409; *Munger v. Munger*, 33 N. H. 581, and cases cited; *Seavey v. Seavey*, 37 N. H. 133.

The case of *Davis v. Goodenow*, 27 Vt. 717, in its principal features bears a close resemblance to the present. The plaintiff was brought up in her grandfather's family. After she was of age, and had gone abroad to work for herself, she returned at the defendant's request, upon the assurance she should be paid as well as she was then doing. This was often repeated during the three years she remained in the defendant's service, much as before she was of age. No reckoning of wages or account on either part was ever had, or kept, nor was any claim made by the plaintiff for pay, or that anything was due her, when she left, or when she needed money to get home, or when she was married, or when the defendant distributed his property; and Redfield, J., says: "Under this state of facts the case seems the ordinary one of a child, or other relative, living in the family of the parent, or one occupying that place, after they become of age, with the assurance that they shall be liberally compensated, without saying in what mode, and with no definite expectation that either the service or support will create a debt; in which case it is well settled that neither can sustain an action against the other for any excess of real value of one above the other."

There were in that case several circumstances which doubtless had their weight in leading the court to this result, which this case does not show. Here nothing appears further than that the daughter, having a right to her time and earnings, and laboring abroad for her own benefit, was requested by her father to come home and work in his family, and he promised her if she would do so he would pay her as much as she could earn elsewhere, and she did come home and worked there as charged. This evidence, standing alone and unexplained, seems to us an express contract by which the father was bound, and upon which the daughter is entitled to recover. This point the parties have a right to try by jury, and for that purpose

The case is discharged.

CHAPTER VI.

ACTION BY PARENT FOR DAMAGE TO PARENT'S RIGHT IN CHILD.¹

DONAHOE v. RICHARDS.

1854. 38 *Maine*, 376.²

APPLETON, J. This suit is brought by the plaintiff, father of Bridget Donahoe, against the defendants, the superintending school committee of the town of Ellsworth, for expelling her from school for a refusal to comply with the orders of her instructor, to read in the common version of the Bible, designated in the report as the Protestant version — such reading being a part of the general course of instruction, and this version being directed to be used in such course. The question presented is, whether the father, if such expulsion were wrongful, has thereby received any such injury as will entitle him to pecuniary compensation.

A minor child is subject to the commands of its father during minority, and the father is entitled to its services. Being entitled to such services, he can maintain an action for any wrongful act done to the child, by which it is disabled or made less able to render its due and accustomed service. The loss of service in such case is held to be the gist of the action. *Hall v. Hollander*, 4 Barn. & Cress. 660. This principle, however, has been so far extended as to enable the father, when the child is too young to render any service, to recover in case of a bodily injury for the trouble and expense he may have incurred in the care and cure of such child. *Dennis v. Clark*, 2 Cush. 347. But in such case he cannot recover for the injury done to his parental feelings, or for the pain and suffering, or the circumstances of insult and aggravation with which the infliction of the injury may have been attended. *Flemington v. Smithers*, 2 C. & P. 292; *Whitney v. Hitchcock*, 4 Denio, 461. For injury to the person, the reputation, or the property, the suit must be in the name of the child, and the damages be awarded

¹ It has generally been held that no action would lie at common law for wrongfully causing the death of a human being. But such an action is now frequently given by statute; and in many jurisdictions a statutory action can be maintained for the benefit of the parent against one wrongfully causing the death of a child. Cases arising under these statutes are collected in *Tiffany on Death by Wrongful Act*. — Ed.

² Statement omitted. — Ed.

in accordance with the circumstances which may have accompanied and aggravated the wrong.

In this case there is no act done by which the ability of the child to render service is diminished. The school is for her benefit and instruction. The education is given to her, and if wrongfully deprived thereof, the loss of such deprivation falls on her. The wrong committed, the injury done, is done to her alone; and if her rights have been violated, she alone is entitled to compensation.

The claim of a plaintiff, under circumstances like those in the present case, has heretofore been examined and determined by courts entitled to the highest consideration, and with an entire uniformity of result.

[After referring to *Spear v. Cummings*, 23 Pick. 224; *Sherman v. Charlestown*, 8 Cush. 161; and *Stephenson v. Hall*, 14 Barb. 222.]

In no case can a parent sustain an action for any wrong done to the child, unless he has incurred some direct pecuniary injury therefrom in consequence of some loss of service or expenses necessarily consequent thereupon. Upon principle as well as authority, the action cannot be maintained.

Nonsuit confirmed.

SHEPLEY, C. J., and TENNEY and HOWARD, JJ., concurred.

WILLIAM WILTON v. MIDDLESEX R. CO.

1878. 125 *Massachusetts*, 130.¹

TORT for loss of services of Ellen Wilton, a daughter of the plaintiff, occasioned by her being run over by one of the defendant's cars on July 16, 1868. Writ dated June 22, 1874.

At the trial in the Superior Court, without a jury, before Pitman, J., it appeared that Ellen Wilton had, in the name of her father as next friend, brought an action against the defendant, and recovered \$5,000 for the injuries done her by this accident. 107 Mass. 108. It also appeared that there had been a guardian appointed by the court, who had paid the plaintiff four dollars a week under the order of the court, and had provided some clothing for Ellen.

Defendant asked the judge to rule as follows: —

“3. On the question of damages, if the plaintiff had received any pay or money from his daughter out of the verdict, paid him as her next friend, or in any way for board, or on account of her relation to him as daughter, such amount must be deducted from the damages, if any; and if the amount received is equal to the loss of service, then he cannot recover at all.

¹ Only so much of the report is given as relates to a single point. — Ed.

“4. The former action having been brought by the plaintiff, and money having been paid to him as next friend, he cannot maintain an action for any loss of service, because he has already been paid therefor.”

But the judge refused so to rule; and ruled . . . that the former payment to the plaintiff, as next friend, had no effect to bar this action; that the money paid by the guardian, while it might be considered as extinguishing any claim the plaintiff might have had for expense incurred for the support of the child, did not take away or reduce his right to recover the reasonable value of her net earnings to her father over and above what, but for the accident, her support would have cost; and found for the plaintiff in the sum of \$500. The defendant alleged exceptions.

L. M. Child, for the defendant.

A. R. Brown (*E. A. Alger* with him), for the plaintiff.

LORD, J. . . . The previous suit is not a bar to the present. The money which the plaintiff received in the former action is not his money; nor can he appropriate it to the payment of labor which the child was bound to perform. The measure of damages in the former action was the injury to the child, and not the injury to the father. It is analogous to the cases, formerly quite frequent, in which, for injuries to a wife, the husband and wife must join for personal injuries to the wife; but, for the expenses incident thereto, the husband must bring his sole action in his own name.

The rulings requested were properly refused, while the principles acted upon by the presiding judge were quite sufficiently favorable to the defendant.

Exceptions overruled.

DENNIS v. CLARK.

1848. 2 *Cushing* (Massachusetts), 347.¹

THIS was an action on the case, to recover for the damages sustained by the plaintiff, by reason of an injury caused by the defendant's mare (alleged to be vicious and accustomed to kick) to the plaintiff's minor son; in consequence of which the plaintiff was put to great expense, costs, and charges, and he and his family subjected to great bodily and mental suffering. In one count of his writ the plaintiff also claimed damages for the personal injury and sufferings sustained by the minor in consequence of the injury.

At the trial before Mellen, J., in the Court of Common Pleas, it was admitted by the plaintiff, that when the injury occurred, the minor was too young to be capable of rendering him any service, and that he was not entitled to recover for the personal injury and sufferings of

¹ Arguments omitted. — Ed.

the child. But the plaintiff claimed to recover for the expenses incurred by him, by reason of the injury, and for his own trouble, and for the medical attendance and nursing of the child, which thereby became necessary.

The judge being of opinion, and so deciding, that the only ground upon which the action could be maintained, was the plaintiff's loss of the services of his child, which, it was admitted, did not exist in the present case, the plaintiff thereupon became nonsuit, and alleged exceptions.

B. F. Cooke, for plaintiff.

W. Gaston, for defendant.

METCALF, J. The question raised by these exceptions is, whether the owner of an animal, known by him to be mischievous, is answerable to the father of a child who is too young to render him any service, for an injury done to the child by such animal, whereby the father is obliged to expend money in the cure of the child. As a general rule of law, such owner is answerable for injuries done by such animal; and if the defendant's mare, in consequence of his omission to restrain her, had injured the plaintiff's ox or dog, the plaintiff might have maintained an action for the injury. And it is properly admitted by the defendant's counsel, that the plaintiff's child might maintain an action for the injury alleged to have been done to him. But it is contended that the plaintiff cannot recover, in this action, because the gist of such action is the loss of service; that the loss of service must be alleged in the declaration and proved at the trial; and that, for want of this allegation, and by reason of the admitted fact, that the child was incapable of rendering service to the plaintiff, the action cannot be supported. The first four cases, cited to sustain these positions, relate to actions by a parent for the seduction of a daughter. And it is doubtless true, that those actions are founded on the relation of master and servant, and not upon that of parent and child, and have always been maintained, not upon the seduction itself, but upon the consequent loss of the daughter's service, in which the parent is supposed to have a legal interest. If there is no loss of service, he cannot maintain an action, although he has been obliged to expend money in the support of the daughter during the confinement and sickness caused by the seduction. *Carr v. Clarke*, 2 Chit. R. 260; *Satterthwaite v. Dewhurst*, 4 Doug. 315; *Grinnell v. Wells*, 8 Scott N. R. 741, and 7 Man. & Grang. 1033; *Eager v. Grimwood*, 1 Welsb., Hurlst. & Gord. 61. But it is equally true that the loss of service is not the measure of damages, in such actions; that the legal gravamen is not the real gravamen; and that the loss of service is a fiction resorted to for the purpose of giving compensation for the actual injury. 3 Bl. Com. 143, Christian's note; 3 Stephen's Com. 540; Holt N. P. 453, note; 2 Selw. N. P. (11th ed.) 1115-1117; 2 Wend. 461; 1 Halst. 325. It is also to be remembered, that, in cases of seduction, the daughter is partaker of the crime, so that she cannot maintain an action against

her seducer: *Paul v. Frazier*, 3 Mass. 71; and that she is always of such an age as to be capable of rendering service to her parent. The decisions, therefore, in that class of cases, are not decisive against the plaintiff's right to maintain the present action.

The last case, cited by the defendant's counsel (8 Watts, 232) states the doctrine concerning actions brought by a master for other injuries done to his servant, as it is laid down in all the books, ancient and modern. See 20 H. 7, 5; 2 Reeves's Hist. of English Law, 45, 46; *Pooley v. Osburn*, cited in 5 Co. 108, and 10 Co. 130; 1 Bl. Com. 429. In *Mary's Case*, 9 Co. 113, which is most frequently referred to on this subject, it is said: "If my servant is beat, the master shall not have an action for this battery, unless the battery is so great that by reason thereof he loses the service of his servant, but the servant himself, for every small battery, shall have an action; and the reason of the difference is, that the master has not any damage by the personal beating of his servant, but by means of a *per quod*, viz., *per quod servitium*, &c., amisit; so that the original act is not the cause of his action, but the consequent upon it, viz., the loss of his service, is the cause of his action; for be the battery greater or less, if the master doth not lose the service of his servant, he shall not have an action." This doctrine, we have no doubt, applies to actions brought by a parent for injuries to his child, when such actions are brought for the loss of the child's service; because, in such cases, the right of action is founded on the relation of master and servant, and not on the relation of parent and child. It is stated in some of the modern books that a father cannot maintain an action for a battery on his child, unless he avers and proves a loss of service. See 1 Wooddeson, 451; 1 Chit. Pl. (6th Amer. ed.) 69, 70; 3 Stephen's Com. 540; Reeve, Dom. Rel. 291. But the authorities there cited do not support this broad position. They go no further than the rule stated by Lord Coke, in *Mary's Case*, and applied in actions for seduction. And it is manifest that this rule does not necessarily include a case like the present. The rule presupposes that the person who is beaten is capable of rendering service to the person who brings the action; and the reason of the rule is, that the personal injury to the servant is not a ground of action for the master. That reason is wholly inapplicable to the case now before us, which is an action to recover the expenses which the plaintiff has been obliged to incur in consequence of the injury sustained by his child.

There are very few cases in the English books which bear directly on the precise point now to be decided. We find, in the Court of Exchequer, the case of *Wotton v. Hunt*, T. Ray. 259, in which the plaintiff alleged that the defendant thrust a person upon the plaintiff's son, "an infant under the age of discretion, by means whereof his thigh bone was broke, and the infant was so hurt that it was despaired of his life, and the plaintiff was enforced to expend great labor and divers sums of money to cure him." After verdict for the plaintiff, the defendant

moved in arrest of judgment. Barons Montague and Atkins overruled the motion, and judgment was given for the plaintiff. Sir Thomas Raymond, who was, at the time of the decision (1679), on the bench of the Court of Exchequer, or Court of Common Pleas, has expressed his opinion, in his report of the case, that the action ought not to have been sustained, "it not being laid *per quod servitium amisit*; but the child himself ought to have brought the action."

In *Hall v. Hollander*, 7 Dowl. & Ry. 133, a father brought an action for an injury done to his son by driving a chaise against him, by means whereof he was sick during the space of six months, "during all which time" (the declaration alleged) "the plaintiff lost and was deprived of the service of his said son and servant, and was also thereby forced and obliged to pay, lay out and expend a large sum of money, in and about endeavoring to procure his said son and servant to be cured," &c. At the trial, it appeared that the plaintiff's son was only two and a half years old; and there was no evidence that he was capable of performing any service for his father. It also appeared that the son was carried to a hospital, where he might have been maintained and cured without any expense to the father; but that the father removed the son to his (the father's) house, and voluntarily incurred the expense which he sought to recover of the defendant. The Court of King's Bench, in 1825, held that the action, as brought, could not be maintained. But Bayley, J., said, "I am certainly not prepared to say, that a declaration might not be framed, in which the father being averred to be under an obligation to maintain the child, and having no means of providing medical assistance, he necessarily incurred expense in and about his cure, so as to enable him to recover." s. c. 4 Barn. & Cres. 660. Since this intimation was made, several English writers have supposed that an action, framed conformably thereto, would be sustained by the English courts. 2 Harrison & Edwards's *Nisi Prius*, 976, note (*h*); 2 Walford on Parties, 1068, 1082-1084; 2 Harrison's *Digest* (Philad. ed. 1846), 3282. But in the case of *Grinnell v. Wells*, already cited to another point, decided by the Court of Common Pleas, in 1844, there are suggestions by Tindal, C. J., which seem to indicate at least a doubt whether such action could be maintained.

Whatever the English law may be on this subject, we are of opinion, that, by our law, a father may maintain an action like the present. By the common law of Massachusetts, and without reference to any statute, a father, if of sufficient ability, is as much bound to support and provide for his infant children, in sickness and in health, as a husband is bound, by the same law and by the common law of England, to support and provide for his wife. 2 Mass. 115, 419. Now, it is clearly the law of England, as well as of this commonwealth, that if a husband desert his wife, or wrongfully expel her from his house, and make no provision for her support, a person who furnishes her with necessary supplies may compel the husband, by an action at law,

to pay for such supplies. And our law is the same, we have no doubt, in the case of a father who deserts or wrongfully discards his infant children. In England, however, the liability of a father, in such case, is matter of doubt, depending, it seems, upon another question, equally doubtful; namely, whether he is bound, by the common law, to maintain his infant children. *Urmston v. Newcomen*, 6 Nev. & Man. 454, and 4 Adolph. & Ellis, 899. That was an action against a father to recover pay for boarding, clothing, &c., his infant daughter. The court held, upon the facts of the case, that the father was not liable to the action. But they declined to give an opinion upon "the general question, whether, by the common law, a parent is bound to maintain his deserted legitimate child." Coleridge, J., said that his opinion was, that a parent was not so bound. 6 Nev. & Man. 466. Neither of the other judges intimated an opinion on the question. See Cro. Eliz. 849; O. Bridgm. 257; 4 East, 84; 6 Mees. & Welsb. 488; 9 Car. & P. 497.

But a husband, in England, as well as here, may maintain an action for a personal injury done to his wife, whereby he sustains loss and is obliged to incur expense in her cure. The declaration, in such action, generally avers, as the precedents show, his loss of her society, or her services, or both, and also the expense necessarily incurred by him in consequence of the injury inflicted upon her. But there may be cases of injury to a wife, where the husband thereby loses neither her services nor her society, and yet may be obliged to pay money for care and attendance upon her while she is suffering under the injury done to her by a third person. The husband may be in India, and the wife on her voyage to join him. If, on the voyage, she is mistreated or injured, so as to require medical or other assistance, which cannot be obtained gratuitously, we cannot doubt the husband's liability to pay for it, nor his right to recover an indemnity from the guilty party. On the same ground, we hold that where an infant child is injured by a wrongdoer, and the father, in consequence thereof, necessarily incurs expense in procuring attendance upon the child, he may recover an indemnity, although he has not lost the services of the child, because of the child's incapacity to render him any service.

The precise point, and the only one, which we decide, is this: If a legitimate infant child, a member of his father's household, and too young to be capable of rendering any service to his father, is wounded or otherwise injured by a third person, or by a mischievous animal owned by a third person, under such circumstances as give the child himself an action against such person, for the personal injury, and the father is thereby necessarily put to trouble and expense in the care and cure of the child, he may maintain an action against such person for an indemnity.

In *Durden v. Barnett*, 7 Alab. 169, it was decided that a father might maintain an action for an injury done to his child engaged in his service against the owner of a dog permitted to run at large after the owner knew him to be accustomed to bite persons. And the court

said, "Even if the child was of very tender years, so as to be incapable of rendering any useful services, the action would doubtless lie, if averments were made of consequential injury by expenses caused in healing the wounds."

The case of *Anthony v. Slaid*, 11 Met. 290, is not at variance with the present decision. In that case it was decided that a person who had made a contract to support all the paupers of a town, in sickness and health, for a specified time and for a fixed price, could not maintain an action against one who had beaten one of the paupers, and thereby increased the expense of supporting him. The damage to the plaintiff was held to be too remote and indirect. But the distinction between that case and this is indicated in the opinion there given. The court say, "It is not by means of any natural or legal relation between the plaintiff and the party injured, that the plaintiff sustains any loss, but by means of the special contract by which he had undertaken to support the town paupers." In the present case the loss, which the plaintiff alleges that he has sustained is the effect of a relation to his child, which is both natural and legal.

Nonsuit taken off, and new trial granted.

NEDERLANDSCH, &c. v. HOLLANDER.

1894. 20 U. S. Appeals, 225.¹

ERROR to the United States Circuit Court for the Southern District of New York.

Heard before WALLACE and SHIPMAN, Circuit Judges.

Suit, by Morris Hollander, against Nederlandsch, &c., otherwise known as the Netherlands-American Steam Navigation Company, to recover \$10,000 damages for the loss of services of his daughter, Gertrude Hollander, five years old, who was hurt while a passenger on one of defendant company's steamships.

The court refused to direct a verdict for the defendant upon the whole evidence.

After charging the jury upon the question of negligence, the court further instructed the jury as follows: This action is one by the father for the loss of services of his child. No element of pain or suffering to the child, no subsequent impairment of the child's capacity, so far as itself is concerned, is to be estimated on and compensated for in this suit. No matter how large might be your verdict here, this child, to-morrow or the day after she reaches twenty-one, might bring suit against this company for this same accident, and recover from another jury the full amount of all pain and suffering and loss of capacity which she had suffered in consequence of this action. Therefore, in assessing the value

¹ Statement abridged. Arguments omitted. — ED.

of the damages, you are to take into consideration that it is only the loss to the father for which this particular suit is brought, and which this particular jury is to assess. He has given testimony of money paid out which aggregates about \$21. Besides that, he is entitled to such sum for the loss of the services of his child as may be reasonable in view of what the circumstances of the case are, to wit, the age of the child and the amount of the services which it might have rendered to him from the date of the accident until the present time. He is also entitled to such compensation as is proper to take the place of any services of this child which he may lose in the future in consequence of the accident. You are not to guess at that. You are not, without evidence, to assume that because the child's arm was broken two years ago, or a year and a half ago, and at this precise moment of time she does not use her arm as her brother does his, that the child is going to be disabled, and I know of no evidence in this case as to what the probabilities of the case are. You are not entitled to guess at that. You must reach your conclusion from evidence. The burden of proof in all these cases is with the plaintiff. The plaintiff must satisfy you by a fair preponderance of truth that he is entitled to recover.

Defendant's counsel requested the court to charge the jury: "That this action is based upon supposed loss by the plaintiff of services of his daughter, and that there can be no recovery in this action beyond the actual expenses proved to have been incurred by the plaintiff in consequence of the injury, except for loss of actual services;" but the court declined so to charge, or to instruct otherwise than as had already been charged, and the defendant's counsel duly excepted to such refusal.

The defendant's counsel also requested the court to instruct the jury: "That there is no evidence in this case that the plaintiff's daughter was capable of rendering any services of value;" but the court declined so to charge, and the defendant's counsel duly excepted.

The defendant's counsel also requested the court to charge the jury: "That loss of services cannot be inferred without evidence;" but the court declined so to charge, or to charge otherwise than as already charged as above stated, and the defendant's counsel duly excepted.

The defendant's counsel requested the court to charge the jury: "That there is no evidence in this case that would justify the jury in finding that the injury to the child is permanent;" but the court declined so to charge, or to charge otherwise than as already charged as above stated, and the defendant's counsel duly excepted.

Verdict for plaintiff, for \$450. Judgment thereon. Defendant brought error.

Joseph A. Shoudy (Messrs. *Wing, Shoudy, & Putnam* were also on the brief), for plaintiff in error.

Benno Loewy and *Henry K. Coddington*, for defendant in error.

WALLACE, Circuit Judge. This is a writ of error by the defendant in the court below to review a judgment for the plaintiff rendered upon the

verdict of a jury. It was proved upon the trial that the plaintiff and his daughter, the latter being of the age of about five years, were passengers on the defendant's steamship "Amsterdam," on a voyage from Rotterdam to New York, in September, 1891; that while they were walking upon the deck of the vessel an iron gate fell on the child, breaking her arm; that the plaintiff employed a surgeon, and took the child to the hospital every fortnight for about six months after her injury; that he incurred expenses for surgical treatment and medicines; that since the accident — a period of something over a year before the trial — the child had suffered from her injuries, and had not been able to use her arm as she did before the accident; and that she continued to have restless nights, and had no one to take care of her but the plaintiff. The evidence tended to show that the child's injuries were caused by the negligence of the defendant. No testimony was introduced to show that the child had ever rendered any services for the plaintiff, or that she was capable of doing so.

The exceptions taken upon the trial, and the assignments of error which have been argued at the bar, raise the questions, (1) whether the action was maintainable either for expenses or for loss of services; and (2) if maintainable for the loss of services, whether there was any evidence which justified the trial judge in instructing the jury that they might award damages for prospective loss of services.

A father whose infant child has been injured by the tort or negligence of a third person has a right of recovery to the extent of his own loss. He cannot recover for the immediate injury to the child. His action rests upon his right to the child's services, and upon his duty of maintenance. When he is deprived of the right, or put to extra expense in fulfilling the duty, in reason and justice he ought to be permitted to have recourse to the wrongdoer for indemnity. He is entitled to be indemnified for his expenses necessarily incurred in the cure and care of the child, and for the loss of the child's services, past and prospective, during minority, consequent upon the injury. By some authorities the loss of services has been regarded as the foundation of the action; and the English courts, influenced by this strict view of the gravamen of the action, have decided that a father has no remedy, even for his expenses, where the child is of such tender years as to be incapable of rendering any services. The authorities in this country approve a more liberal and more reasonable doctrine, and, basing the right of action upon the parental relation, instead of that of master and servant, allow the father to recover his consequential loss, irrespective of the age of the minor. *Dennis v. Clark*, 2 Cush. (Mass.) 347; *Cuming v. Brooklyn City Railroad Co.*, 109 N. Y. 95; *Clark v. Bayer*, 32 Ohio St. 299; *Durden v. Barnett*, 7 Ala. 169; *Sykes v. Lawlor*, 49 Cal. 236.

It was within the province of the jury to form an estimate of the damages which would compensate the plaintiff for his present and prospective loss upon the facts which were before them. Whether the

plaintiff's daughter, in view of her age, could render him any services having a pecuniary value, was a question of fact. It could not have been ruled as a question of law that a child of her years was incapable of doing so. The evidence showed the child's disability had lasted for more than a year, and still continued, thus raising the presumption that it would continue in the future for a longer or shorter period. Having these facts and the age and the sex of the child before them, the jury were as well qualified as any expert could be to form a correct opinion as to the duration of her incapacity, and the value of her services to her father. A case could hardly be imagined in which it would be more impracticable to furnish direct evidence of any specific loss by deprivation of services. Any evidence respecting the prospective loss would necessarily have been speculative and hypothetical, and could not have been of any real assistance to the jury. *Union Pacific Railway Co. v. Jones*, 4 U. S. App. 115; *Ihl v. Forty-Second Street and Grand Street Ferry R. R. Co.*, 49 N. Y. 317; *Oakland R. Co. v. Fielding*, 48 Pa. State, 320.

There was no error in the refusal of the trial judge to direct a verdict for the defendant, or in his instructions to the jury upon the subject of damages, and the exceptions of the defendant were not well taken.

The judgment is affirmed.

GRINNELL v. WELLS.

1842. 7 *Manning & Granger*, 1033.¹

TINDAL, C. J. The question in this case arises upon a motion in arrest of judgment, and is this — whether a father can maintain an action upon the case for the seduction of his daughter, where he is unable to allege in the declaration, the loss of her service by reason of the defendant's wrongful act.

The declaration in this case contains no allegation of the loss of the service of the daughter, but instead thereof, alleges that the daughter was a poor person, maintaining herself by her labor and personal services, and not of sufficient ability to maintain herself otherwise; and, after stating that the defendant debauched her, and that she was delivered of a child, and her thereby becoming unable to work or maintain herself, alleges, as the gravamen of the plaintiff, that he, being her father, and being of sufficient ability to maintain his said daughter, was, by means of the premises, forced and obliged to, and necessarily did, maintain his said daughter, at his own charges, and did necessarily pay large divers money, and incur divers debts in and about the maintaining and nursing &c. of his said daughter, during the time she was unable to maintain herself. And the question arises — whether the want of the allegation

¹ Statement and arguments omitted. — Ed.

of the loss of service, is supplied by the substitution of the before-recited allegation.

The foundation of the action by a father to recover damages against the wrongdoer for the seduction of his daughter, has been uniformly placed, from the earliest time hitherto, not upon the seduction itself, which is the wrongful act of the defendant, but upon the loss of service of the daughter, in which service he is supposed to have a legal right or interest. Such is the language of Lord Holt in *Russell v. Corne*, and such the opinion of the court in the earlier case of *Gray v. Jefferies*, with reference to an action by a father for a personal injury to a child, which stands precisely on the same footing. See also *Randle v. Deane*, 2 Lutw. 1497. It has, therefore, always been held that the loss of service must be alleged in the declaration, and that loss of service must be proved at the trial, or the plaintiff must fail. See *Bennett v. Alcott*. It is the invasion of the legal right of the master to the services of his servant, that gives him the right of action for beating his servant; and it is the invasion of the same legal right, and no other, which gives the father the right of action against the seducer of his daughter. This distinction is most clearly and pointedly put by the court in *Robert Mary's Case*, where it is said, "If my servant be beaten, the master shall not have an action for this beating, unless the battery is so great that by reason thereof he loses the service of his servant; but the servant himself for every small battery shall have an action: and the reason of the difference is, that the master has not any damage by the personal beating of his servant, but by reason of a *per quod*, viz. *per quod servitium amisit*; so that the original act is not the cause of his action, but the consequent upon it, viz. the loss of the service, is the cause of his action."

No precedent in an action for seduction has been brought before us (except those in *Harris v. Butler* and *Blaymire v. Hayley*, in both of which cases the declarations were held bad), in which there has not been an allegation of the loss of service to the father: and the struggle has always been at the trial, to give some proof either of actual service or of the implied relation of master and servant. And in the case of *Dean v. Peel*, where the loss of service was alleged in the declaration, but where the proof at the trial was only this, that the daughter was in the service of another person at the time of the seduction without any intention of returning to her father's house; but that, upon her seduction, she came home and was maintained by her father during her illness, the action was notwithstanding held not to be maintainable. Now, that case is, in evidence, precisely what the present case is in pleading upon the record; and therefore it affords a direct authority for the position, that, where there is the absence of any allegation of the loss of service to the father, although there may be an allegation of his being compelled to pay the expenses arising from the wrongful act, the action is nevertheless not maintainable. Upon the ground of action, therefore, set forth upon this record, we do not feel ourselves warranted

in giving judgment for the plaintiff; as we think the declaration discloses no legal wrong to the plaintiff, no invasion or violation of his legal rights.

Many observations suggest themselves against the soundness of the argument upon which the plaintiff relies.

In the first place, if the liability to support the daughter under the statute of *Elizabeth*, would form a ground of action *per se*, independently of any service, it would seem scarcely credible, — as that statute was passed long before any of the cases above referred to, — that the difficulty of proof of service, either actual or implied, which has occurred in so many cases, should not have been avoided and answered by framing the declaration, — like the present, — upon the legal liability of the father to maintain his daughter under the statute.

In the next place, if this ground of action is available in the case of seduction of a daughter, it is equally so in the case of every beating of a son, whether his service be lost or not: and, upon this supposition, the beating of a son, at whatever advanced age, and although altogether emancipated from his father's family, would form a ground of action at the suit of the father, if called upon, under the statute, to maintain his son.

And, still further, this anomaly would follow, that, as the father is only liable, under the statute, to maintain his daughter where he is of sufficient ability so to do, and as the damages recoverable by the father, when he brings the action, are, confessedly, not limited to the actual expenditure of his money, but may be given according to the circumstances of aggravation in the particular case, the right of action to recover compensation would be confined to persons of ability to maintain the daughter, and would be denied to the poorer orders of the community — a result that would be most unreasonable. (a)

We therefore think, for the reasons above given, the cause of action as stated on this record, is insufficient, and that the rule for arresting the judgment must be made absolute.

*Rule absolute.*¹

(a) It may be observed, however, that the *quasi* fiction of *servitium amisit* affords protection to the rich man, whose daughter occasionally makes his tea, but leaves without redress the poor man, whose child, as here, is sent, unprotected, to earn her bread amongst strangers.

¹ "Statutes have been enacted in some States to make the seduction the gist of the action, and to give a right of action to the parent without the necessity of proving loss of service." See references to various statutes in 21 Am. & Eng. Encyclopædia of Law (1st ed.), 1024, note 1.

Statutes have also been enacted in some States giving the seduced woman a right of action in her own name. — ED.

MAUNDER *v.* VENN.1829. *Moody & Malkin*, 323.WESTERN CIRCUIT. Exeter. *Coram* LITTLEDALE, J.

This was an action to recover compensation for the seduction of the plaintiff's daughter.

The cause was undefended; but in the course of the plaintiff's proof, a difficulty occurred in making out any acts of service of the daughter. It being, however, proved that the seduction took place while she was residing with the plaintiff, and forming part of his family.

LITTLEDALE, J., interposed, and said that the proof of any acts of service was unnecessary: it was sufficient that she was living with her father, forming part of his family, and liable to his control and command. The right to the service is sufficient. I remember Lord Alvanley so ruling, and I have always myself been of the same opinion; if it were otherwise, no action could be maintained for this injury by a father in the higher ranks of life, where no actual services by the daughter are usual.

Some acts of service were, however, subsequently proved, and the plaintiff obtained a verdict for one hundred pounds.

MARTIN *v.* PAYNE.1812. 9 *Johnson* (New York), 387.

THIS was an action of trespass on the case for debauching, and getting with child, Lanah, the daughter and servant of the plaintiff, by which he lost her service, and was obliged to expend a large sum of money for the expenses of her lying in, &c.

The cause was tried at the Washington Circuit in June, 1811, before Mr. Justice Spencer. At the trial the daughter of the plaintiff was produced as a witness, and proved the seduction, and pregnancy, &c.; that at the time of the seduction, which was in the spring of the year 1810, she was nineteen years of age, and lived in the house of her uncle, with whom she had resided from the autumn of 1809. She worked for her uncle when she pleased, and was to receive from him, for her work, one shilling per day. She also worked for herself, and expended all her earnings, in clothes and necessaries for herself, as she saw fit. There was no agreement for her continuance in her uncle's house for any particular time; but she went to reside with him, on the terms above mentioned, with the consent of her father. The defendant paid his addresses to her, while she was at her uncle's, and she expected to have married him; and had, at that time, no expectation of returning

to her father's house to reside. During the period of her residence with her uncle, she occasionally visited her father's house, remaining there a week at a time. Immediately after she was debauched, she returned to her father, who supported her, and was at the expense of her lying in, &c. It did not appear that the father had done any act dispensing with his daughter's service, other than consenting to her remaining with her aunt.

The defendant's counsel objected, that the plaintiff was not entitled to recover; but the judge, without deciding the question, permitted the cause to go to the jury, who found a verdict for the plaintiff, subject to the opinion of the court, on the facts in the case, as above stated.

Skinner, for the plaintiff. If, at the time of her seduction, the daughter can be considered as in the service of her father, the action is maintainable. The only evidence to the contrary is the declaration of the daughter that she did not expect to return to her father's house to reside; but this must be taken in connection with her previous language, that she was courted by the defendant, and expected to be married to him. The fair inference from the whole testimony is, that she grounded her expectation of not returning again to live with her father, on the belief that she was soon to be married to the defendant. It cannot, therefore, be said that here was, in truth, no *animus reverendi*. This case is clearly distinguishable from that of *Dean v. Peel* (5 East, 45), which will, no doubt, be relied upon by the defendant's counsel. Here the daughter went to live with her uncle, by consent of her father, under a contract with the uncle to pay her for her services. The father was bound to maintain her, and permitted her to go out to earn wages. In case her uncle had refused to pay her, the father only could have maintained an action against the uncle to recover the wages. She must, therefore, in presumption of law, be considered as in the service of her father. He is responsible for her maintenance while she is under age, and is, therefore, entitled to her services and earnings.

The case of *Dean v. Peel* is a recent decision of the English Court of King's Bench, and is opposed to the principle of prior adjudications. It has no binding authority on this court.

Henry, contra. This is an action for a loss of service. A father cannot maintain an action against another for debauching his daughter and getting her with child. He can only maintain an action of trespass *quare clausum fregit* for entering his house, and assaulting and getting his daughter with child, *per quod servitium amisit*. The only ground on which the action is sustainable is a loss of service; the rest is matter of aggravation.

The plaintiff must make out an actual and subsisting relationship of master and servant. There must be an actual service, and under the parental roof. If at the time of the seduction the daughter is not in the actual service of her father, he cannot maintain this action. The case of *Dean v. Peel* is in point. That case is not new law; it

recognizes only principles before settled. The facts of this case are stronger against maintaining the action.

The mere circumstance that the father is legally entitled to the wages earned by his child will not give him a right to this action. The right of the father to those services is founded on the fact of his protecting and maintaining his child. He is entitled to this action because he is the protector and guardian of the morals and virtue of his child; but if he suffers her to depart from his house, or withdraws his protection, he has no right to an action. If the daughter remains under his roof and protection, he may maintain an action for entering his house and debauching her, *per quod servitium amisit*, though the daughter is an adult; but some acts of service, however slight, must be proved, though there need not be a contract of service.

J. Russel, in reply, insisted that if the relationship of master and servant existed either at the time of the seduction, or at the time of the alleged loss of service, the action was maintainable; for the daughter being under age, and having returned to the house of her father while pregnant, and there lain in, an actual loss of service had accrued. A service, *de facto*, is not necessary to be shown. It is enough that the father is entitled to the services of his daughter while under age, and has a right to control her conduct. Her secret determination to marry, and not return to her father's house, cannot change the relationship, nor affect his rights. The principle of the decision in *Dean v. Peel*, that the daughter had expressed an intention not to return to her father's house, is not founded in reason; and the case of *Postlethwaite v. Parks* merely decides that this action is not maintainable where the daughter is of full age, and resides abroad out of her father's house.

SPENCER, J., delivered the opinion of the court. The case of *Dean v. Peel* (5 East, 45) is against the action. It was there held that the daughter, being in the service of another, and having no *animus reverendi*, the relationship of master and servant did not exist. In the present case, the father had made no contract hiring out his daughter, and the relation of master and servant did exist from the legal control he had over her services; and although she had no intention of returning, that did not terminate the relation, because her volition could not affect his rights. That is the only case which has ever denied the right of the father to maintain an action for debauching his daughter whilst under age; and I consider it as a departure from all former decisions on this subject. It has frequently been decided that where the daughter was more than twenty-one years of age there must exist some kind of service; but the slightest acts have been held to constitute the relation of master and servant in such a case. In *Bennet v. Alcott* (2 Term Rep. 166) the daughter was thirty years of age, and Buller, Justice, held that even milking cows was sufficient. But where the daughter was over twenty-one, and in the service of another, as in *Postlethwaite v. Parkes* (3 Burr. 1878), the action is not maintainable. In *Johnson v. M Adam*, cited by Topping, in *Dean v. Peel*, Wilson,

J., said, that where the daughter was under age, he believed the action was maintainable, though she was not part of the father's family when she was seduced, but when she was of age, and no part of the father's family, he thought the action not maintainable. In *Fores v. Wilson* (Peake's N. P. Cas. 55) which was an action for assaulting the maid of the plaintiff, and debauching her, *per quod*, &c., Lord Kenyon held that there must subsist some relation of master and servant, yet a very slight relation was sufficient, as it had been determined that when daughters of the highest and most opulent families have been seduced, the parent may maintain an action on the supposed relation of master and servant, though every one must know that such a child cannot be treated as a menial servant.

Put the case of a gentleman's daughter at a boarding school, debauched and gotten with child, on what principle can the father maintain the action but on the supposed relation of master and servant, arising from the power possessed by the father to require menial services; for, in such a case, there is no actual existing service constituting the relation of master and servant. Would it not be monstrous to contend that, for such an injury, the law afforded no redress? The case supposed is perfectly analogous to the one before us. Here the father merely permitted his daughter to remain with her aunt; he had not divested himself of his power to reclaim her services, nor of his liability to maintain and provide for her. She was his servant *de jure*, though not *de facto*, at the time of the injury, and being his servant *de jure*, the defendant has done an act which has deprived the father of his daughter's services, and which he might have exacted but for that injury. We are of opinion that the action is maintainable under the circumstances of this case, and, therefore, deny the motion for a new trial.

Motion denied.

DAIN v. WYCOFF.

1852. 7 *New York*, 191.¹

THIS action was brought by the plaintiff for the seduction of his daughter. It was tried at Tompkins Circuit in April, 1850, before Justice Gray, when a verdict for one thousand dollars was rendered for the plaintiff. A motion for a new trial made upon bill of exceptions was denied by the general term of the Supreme Court in the sixth district and judgment given upon the verdict.

It appeared by the bill of exceptions that Sally Dain, the plaintiff's daughter, when about fourteen years of age, was bound as an apprentice to the defendant, who shortly after seduced her and had criminal

¹ Only so much of the report is given as relates to a single point. The arguments are omitted. — ED.

intercourse with her frequently, until she was sixteen years of age, when she became pregnant. She was then induced by him to take drugs with a view to produce an abortion, but the attempt to do this was unsuccessful and she gave birth to a living child.

Cushing, for appellant.

Bruyn, for respondent.

GARDINER, J. . . . 3. The defendant moved for a nonsuit upon the ground that the relation of master and servant did not subsist between the plaintiff and his daughter when she was seduced. It appeared that she was the apprentice of the defendant and bound to live with him until she was eighteen, and that the seduction occurred while she was thus in fact and in law the servant of the defendant. The relation of master and servant is the foundation of the action for loss of service (4 Comstock, 38, and cases there cited). The plaintiff to maintain the action must have had the right to the service of his daughter. But he proved that she not only resided with the defendant but owed him service when the injury was committed. Unless the defendant procured the daughter to enter into his service with a view to her seduction, of which there is no pretence, the plaintiff should have been nonsuited.

We all agree that the judgment should be reversed, for the reason last suggested. My brethren express no opinion upon the other points in the case.

WELLS, J. [After stating the facts.] It is abundantly settled by authority that in order to sustain an action of this description it must appear that the relation of master and servant existed at the time the injury complained of was committed. The action is founded on the loss of service, and in order to maintain it the relation must be actual or constructive. If the plaintiff is not receiving the services of his daughter at the time he must be in a situation and have the legal right to command them at pleasure. In this case the plaintiff's daughter was not at the time she was seduced and got with child his servant but was the servant of the defendant, who had the legal right to and was actually receiving her services. In the late case of *Bartley v. Richtmyer* (4 Comst. 38), Bronson, Ch. J., has given the whole subject of the principles of this action a full examination, and it is unnecessary to repeat the views which are there so well stated. The case is in point and in effect decides this. According to the principles held by this court in the case referred to it is impossible for the plaintiff in the present case to sustain an action upon the proof which was given at the trial.

Judgment reversed and new trial ordered.

MERCER v. WALMSLEY.

1820. 5 *Harris & Johnson (Maryland)*, 27.¹

BUCHANAN, C. J. The objection, that an action on the case will not lie by a father for debauching and getting his daughter with child, *per quod servitium amisit*, cannot be maintained either on principle or authority. Where a man illegally enters the house of another, and debauches his daughter, the father may have an action of trespass *quare clausum fregit*, and lay the debauching of his daughter and loss of her services as consequential; or he may at his election bring an action on the case for debauching his daughter, *per quod servitium amisit*; but for merely debauching a man's daughter, unaccompanied by an unauthorized entry into the father's premises, the action is case, and the loss of service is the gist of the action.

The only question, therefore, in the case before us is, whether the evidence exhibited in the bill of exceptions is such as to enable the plaintiff to recover? and we clearly think that it is not. Margaret Walmsley, the daughter, the only witness examined at the trial, was produced by the father himself, and from his own showing it appears that she was upwards of twenty-one years of age, was not his servant *de facto*, and did not live with him at the time she was debauched; but that she was living at the house of the defendant, where she had lived more than a year, doing different descriptions of work, and attending to the affairs of the family generally.

A father may maintain an action for debauching his daughter when under age, *per quod servitium amisit*, whether she was living with him at the time the offence was committed or not; for from the legal control he had over her services, the law implies the relation of master and servant, unless in the case of her not living with him he had, by some act of his own, destroyed that relation. She is his servant *de jure*, and by debauching her an act is done that deprives him of services which he might have exacted. In the case of *Dean v. Peel*, reported in 5 East, 45, it was held, that the daughter being in the service of another, and having no *animus revertendi*, the relation of master and servant had ceased to exist, and that therefore the father could not maintain the action. But it is much questioned whether merely by her volition a daughter, under the age of twenty-one years, can so divest her father of his power to reclaim her services as to affect his right of action. But when a daughter is over the age of twenty-one, and not in the actual service of her father when the injury is done, he cannot sustain the action, And so are all the authorities except the case of *Johnson v. M'Adam*. cited in the case of *Dean v. Peel*. In that case the daughter was under the age of twenty-one when she left her father's house, but attained that age a short time before she was seduced; and the judge before whom

¹ Statement omitted. — Ed.

the cause was tried, considering it a middle case, saved the point; there was no new trial moved for, and the question was never afterwards decided. But it appeared in summing up the evidence to the jury, that the judge went on the ground, that from the circumstances of the case she might be considered as continuing to be a part of her father's family. If a daughter be living with her father, and in his service, though over the age of twenty-one, the action may be sustained, and any slight service will be sufficient to raise the inference of fact, that she was his servant: as in the case of *Bennet v. Alcott*, 2 Term Rep. 166, where the daughter was thirty years old. But where the daughter was above the age of twenty-one, and in the service of another at the time of the injury, the action cannot be maintained by the father.

In this case it is contended that the daughter was not the servant of the defendant, there being no contract for wages; but let it be remembered, that he frequently gave her money in consideration of the services she rendered in his house of a menial nature, and authorized her to call for money whenever she wanted it, and that she was living with him at the time; and it is enough to defeat the action that she was not *living* with her father, but with another. It is only where a daughter, being above twenty-one, was *living* with her father, that a slight act of service is held to be evidence of her being in fact his servant; and it is not like the case of an *infant* daughter, living out of her father's family, where the *law* implies the relation of master and servant, for *eo instanti* that the daughter reaches the age of twenty-one, the relation of master and servant *de jure* ceases to exist, and the *law* will not imply it. It must be shown that she was her father's servant *de facto* at the time, &c., which cannot be when living in the family of another, as in this case.

[Remainder of opinion omitted; also the concurring opinion of JOHNSON, J.]

BEAUDETTE v. GAGNE.

1895. 87 *Maine*, 534.¹

W. H. Judkins, W. H. Newell, and W. B. Skelton, for plaintiff.

[Argument omitted.]

F. L. Noble, and R. W. Crockett, for defendant.

If the daughter is of age, some act of service is necessary on the part of the daughter to enable the father to maintain the action; but however slight the act of service may be, it must be a real genuine service, such as the parent may command. 2 Addison on Torts, Wood's Ed. 514, note and cases; 2 Greenl. Ev. § 572.

¹ Only so much of the opinion is given as relates to a single point. — ED.

Had the plaintiff's daughter, although of age, resided in the plaintiff's family and in return for her board or other support done the acts of service mentioned above, the plaintiff could recover; but the evidence in this case shows that she supported herself from her own wages earned in the mills, and whatever acts of service she performed as a member of her father's family were purely voluntary on her part, and that the father had no right to command the performance of them.

WISWELL, J. Action on the case by a father for the seduction of his adult daughter. The defendant alleges exceptions for the following causes : —

IV. Lastly, exception is taken to the refusal of the court to instruct the jury that unless the services rendered by the daughter were such as the plaintiff could command and were not voluntary on her part, the plaintiff could not recover.

This form of action is based upon the legal fiction of loss of service, and the relation of master and servant must exist. In the case of a minor daughter such relation is presumed to exist between her and her father, and no acts of service need be proved, unless he has divested himself of the right to control her person or to require her services. When the daughter is of age, it must appear that she resided in her father's family and performed some acts of service, however slight. This was decided to be the law in this State in the case of *Emery v. Gowen*, 4 Greenl. 33, a case which has been frequently cited and followed by the courts of other States.

The learned justice who presided, in his charge to the jury fully and clearly explained the somewhat peculiar rules of law which are applicable to an action of this kind, in the course of which he said: "But if, at the time of the seduction, she is of age, that is, more than twenty-one years of age, then it must appear that the family relations continued to exist, that she was at least a resident of her father's family and performed some service. But it is held that the most trifling services, under those circumstances, are sufficient to create the relation." This instruction was all that the defendant was entitled to, and was in accordance with the weight of authority. See *Emery v. Gowen*, *supra*; *Mercer v. Walmsley*, 5 Harris & Johnson (Maryland), 27; *Vossell v. Cole*, 10 Missouri, 634; *Davidson v. Abbot*, 52 Vt. 570; *Martin v. Payne*, 9 Johns. 388, and cases collected in the Am. & Eng. Encycl. of Law, Vol. 21, pages 1009 to 1017, under title of Seduction.

It is not necessary that the services of an adult daughter should be such as the father can command. Ordinarily a father cannot command the service of a daughter of age, — he cannot compel the service of his child over twenty-one as he can that of his minor child. It is sufficient if by mutual assent the relation of master and servant did in fact exist.

Exceptions overruled.

ABRAHAMS v. KIDNEY.

1870. 104 *Massachusetts*, 222.

TORT, for seducing the plaintiff's minor daughter, "whereby she became sick and unable to render service to the plaintiff." Trial in the Superior Court before Lord, J., who allowed the following bill of exceptions:—

"The declaration contained no allegation, and it was not contended, that the defendant's seduction of the plaintiff's daughter was followed by pregnancy or any sexual disease. Evidence was offered to show that, by reason of the seduction, and the general injury to the health of the daughter consequent thereon, it became necessary for the plaintiff to send her to New York for her health, and that, by so sending her, the plaintiff incurred great expense, together with the loss of her services. But the judge excluded this evidence, ruled that the action could not be maintained, and directed the jury to return a verdict for the defendant, which was done; and the plaintiff alleged exceptions."

C. Cowley, for the plaintiff.

J. Nickerson, for the defendant.

MORTON, J. At the trial of this case, the plaintiff offered to show that, by reason of the seduction, and of the general injury to the health of the daughter consequent thereon, she lost the services of her said daughter. It having appeared that the defendant's seduction of the daughter was not followed by pregnancy or by any sexual disease, the presiding judge excluded the evidence, and ruled that the action could not be maintained. The bill of exceptions is very brief, and does not state the grounds upon which the ruling was based; but we think that, upon a fair construction of it, the ruling was to the effect that an action for seduction cannot be maintained unless it is followed by pregnancy or sexual disease. We are of opinion that this ruling was erroneous.

The rule which governs the numerous cases upon this subject is, that where the proximate effect of the criminal connection is an incapacity to labor, by reason of which the master loses the services of his servant, such loss of service is deemed to be the immediate effect of the connection, and entitles the master to his action. The same principle which gives a master an action where the connection causes pregnancy or sexual disease applies to all cases where the proximate consequence of the criminal act is a loss of health resulting in a loss of service. There may be cases in which the seduction, without producing pregnancy or sexual disease, causes bodily injury, impairing the health of the servant and resulting in a loss of services to her master. So the criminal connection may be accomplished under such circumstances, as, for instance, of violence or fraud, that its proximate effect is mental distress or disease, impairing her health and destroying her capacity to labor. In either of these cases the master may maintain an action, because the

loss of services is immediately caused by the connection, as much as in cases of pregnancy or sexual disease. *Vanhorn v. Freeman*, 1 Halst. 322. But if the loss of health is caused by mental suffering, which is not the consequence of the seduction, but is produced by subsequent intervening causes, such an abandonment by the seducer, shame resulting from exposure, or other similar causes, the loss of services is too remote a consequence of the criminal act, and the action cannot be maintained. *Boyle v. Brandon*, 13 M. & W. 738; *Knight v. Wilcox*, 4 Kernan, 413.

In the case at bar, as the ruling appears to have been general, that the action could not be maintained unless pregnancy or sexual disease was proved, we think a new trial should be granted.

Exceptions sustained.

COWDEN v. WRIGHT.

1840. 24 *Wendell (New York)*, 429.

ERROR from the Genesee C. P. Wright sued Cowden in an action of trespass for assaulting and beating his son, *per quod servitium amisit*. Cowden was the teacher of a select school, and the plaintiff's son was one of his scholars, and the beating complained of was by way of punishment for disorderly conduct. The court, among other things, charged the jury that in making up their verdict they might take into the account *the feelings of the parents* occasioned by the infliction of the punishment of their son. To which the defendant excepted. The jury found a verdict for the plaintiff with \$75 damages. Judgment having been entered upon the verdict, the defendant sued out a writ of error.

C. P. Kirkland, for the plaintiff in error.

J. A. Spencer, for the defendant in error.

By the Court, NELSON, Ch. J. I think the court erred. The foundation of the action is the loss of service and the expense and trouble the parent is subjected to in taking care of his child.

It is true that, in the action for the seduction of a daughter, the jury in fixing upon the damages may regard the wounded feelings of the family; but that case has always been considered *sui generis*, and inconsistent with the fundamental principle of the action. Besides, there is a marked distinction between that and the present case. There the only remedy for the injury is the action by the parent; the daughter is without redress, however aggravated the seduction. It is not therefore surprising the courts should have been indulgent in the measure of damages in the particular case. But here the child may also maintain an action against the defendant, in which the measure of redress depends very much upon the sound discretion of the jury, because his personal injury and suffering then constitute the gravamen of the suit.

Full opportunity is here afforded to inflict upon the wrongdoer punishment in proportion to the aggravation of the assault. The two remedies, one in behalf of the parent, the other of the child, seem to me sufficiently liberal, when taken together, upon the principles above stated; certainly as much so, and more onerous to the defendant, as in the case of the injured party, where the remedy is confined to one action for the assault.

Edmondson v. Machell, 2 T. R. 4, may, I think, be regarded as countenancing the view we have taken. Trespass for assaulting and beating the plaintiff's niece, *per quod*, &c., was brought by the aunt, and at the same time another action was brought by the niece for the same assault. The counsel for the aunt, on the trial, withdrew the record in the latter case, and declared their intention not to try it. The defendant insisted that the jury could only give damages for the loss of service; the court ruled otherwise, and placed the case on a footing with the action for seduction. On a motion for a new trial, it was admitted the damages were not excessive, if the jury had a right to take both actions into their consideration; and the court, on the niece stipulating not to proceed in her action, refused to grant a new trial. But it is obvious, from the report of the case, the result would have been different without this stipulation; in effect, I think, denying the analogy to the suit for seduction.

Judgment reversed; *venire de novo*; costs to abide event.

LIPE v. EISENLERD.

1865. 32 *New York*, 229.¹

ACTION for the seduction of the plaintiff's daughter and servant. She was about twenty-nine years of age, and resided generally in the family of her father, who was a farmer, performing such services about the dairy and housekeeping as are usual under such circumstances, and being provided for and supported by him.

The judge (after instructing the jury as to the plaintiff's right to maintain the action) charged that the right to exemplary damages was not affected by the fact that the relation existed by contract, inasmuch as the plaintiff was her father. Defendant excepted. Verdict for plaintiff for \$1,000. Defendant appealed from the judgment of affirmance rendered at the General Term.

R. W. Peckham Jr., for appellart.

John H. Reynolds, for respondent.

[Arguments omitted.]

DENIO, Ch. J. . . . Finally, it is urged by the defendant's counsel that only compensatory damages should have been allowed. The judge

¹ Only so much of the report is given as relates to a single point. — ED.

refused so to direct the jury, and I think he was right. The object of the action in theory is to recover compensation for the loss of the services of the person seduced. This is so far adhered to that there must be a loss of that kind or the action will fail; but when that point is established the rule of damages is a departure from the system upon which the action is allowed. The loss of service is often merely nominal, though the damages which are recovered are very large. It is too late to complain of this as a departure from principle, for it has been the law of this State and of the English courts for a great many years. But it is argued that it does not apply except in cases in which the father sues for the loss of the services of his infant daughter, and where he makes title by means of the parental relation. This seems to me an unreasonable refinement. Here the father is the plaintiff, and the money recovered will belong to him precisely as it would if the daughter were under age. The mortification and disgrace, and the injury to the sentiments and affections are of the same character, and are not likely to be essentially different in degree. The delinquency of the defendant is in no respect different. Why should damages beyond a strict pecuniary compensation be given in one case and withheld in the other? I can see no reason for it whatever. The action, considered as one to redress a moral outrage and punish libertinism under the form of a remedy for the loss of manual services, is peculiar and anomalous. This case is within all the reasons which have led to the exceptional course of decision, and I see no authority for distinguishing it from the rule now well established.

The defendant's point is that where the required relation is established by convention, only compensatory damages can be given, and that the rule authorizing another measure of recovery should be limited to cases where the plaintiff makes title solely through the parental relation. The true rule, I think, is that the plaintiff's right to the services may be made out in either way, and that when established, so that the action is technically maintainable, the court and jury are to consider whether the plaintiff, on the record, is so connected with the party seduced as to be capable of receiving injury through her dishonor. A mere master, having no capacity to be injured beyond the pecuniary worth of the services lost, should undoubtedly be limited, in his recovery, to the value of these services. But the case of this plaintiff, as has been mentioned, is quite different. Hence, there was no error in the ruling to which exception was taken.

Judgment affirmed.

CHAPTER VII.

LIABILITY OF PARENT FOR TORT OF CHILD.

PAUL v. HUMMEL.

1868. 43 *Missouri*, 119.

ERROR to St. Louis Circuit Court.

Plaintiff sued defendant for damages, in the sum of two thousand dollars, for injury to her minor son, aged six years, received at the hands of a minor son of defendant, aged eleven years, who was residing with, and under the charge and control of, his father, the said defendant. In the petition plaintiff stated in substance, among other matters, that said son of defendant became and was dangerous to plaintiff and her children, by reason of his vicious and destructive temper and of his sudden and causeless fits of anger, and that plaintiff notified said defendant of said fact, and desired him to restrain and control his said son, to the end that she and her children might live in safety; that said defendant failed and neglected to restrain and control his said son; and that, in consequence of such failure and neglect, said injury resulted.

To this petition the defendant demurred, on the ground that a father is not responsible for injuries caused by an assault made by his minor child.

The demurrer was sustained by the court below, and final judgment thereon entered in favor of defendant.

Thompson & Bell, for plaintiff in error.

Baker v. Haldeman, 24 Mo. 219, on the authority of which the court below sustained the demurrer in this case, was an action to recover damages for an alleged assault upon the minor son of plaintiff by the minor son of defendant.

The petition charged an assault with a knife, and cutting, maiming, and wounding therewith. The jury, having been instructed, at the instance of defendant, that "unless the plaintiff has established that the boy was of vicious disposition and habits, and that the father knew it at the time, he is not responsible in damages for the injury sustained," found a verdict for the defendant. On error to this court, the only question was on the instruction, which was decided to be erro-

neous, but not to the plaintiff's prejudice, and not a matter for him to complain of.

In the case now before the court the plaintiff seeks to recover on other and different grounds from those occupied by the plaintiff in *Baker v. Haldeman*. In that case it was attempted to charge defendant with liability for a trespass committed by his son, solely because the defendant was the father of a trespasser. In this case the plaintiff proceeds on the theory that it was the duty of the father to control and restrain his son, a member of his family, unfitted by age and temper to govern himself, whereby, by reason of his disposition and habits, he was dangerous to the neighbors, and when the father had been notified by them that such was the fact, and so requested to do.

If the damage had been charged in our petition to have been committed by a mischievous and dangerous animal, the property of defendant, the demurrer would have been overruled. (*Durden v. Barnett*, 7 Ala. 169; *Dennis v. Clark*, 2 Cush. 347.) Can the fact that it was perpetrated by the mischievous and dangerous son of defendant, irresponsible by reason of his minority and disposition, excuse the defendant from the consequences of his own negligence?

Woerner & Kehr, for defendant in error.

[Argument omitted.]

WAGNER, J. In *Baker v. Haldeman*, 24 Mo. 219, it was decided by this court that a father was not responsible for injuries caused by an assault made by his minor child. But an attempt is made to evade that decision, or at least to exclude this case from its reasoning, by averring in the petition that the child of the defendant, who caused the injury, was dangerous to the plaintiff and her children, by reason of his vicious and destructive temper and of his sudden and causeless fits of anger, and that defendant had notice of that fact. It is not averred that defendant sanctioned the wrong committed by his minor son, either before or after the act. But the petition was doubtless framed upon the theory that an instruction given in the trial court, in Baker's case, was correct law, as that case was not reversed on error. The instruction was that, "unless the plaintiff has established that the boy was of vicious disposition and habits, and that the father knew it at the time, he is not responsible in damages for the injury sustained, and the jury will find for the defendant." The verdict was for the defendant, and the judgment therein was affirmed; but Judge Leonard, in giving the opinion of the court, said that, although the instruction given at the instance of the defendant was erroneous, it was not to the plaintiff's prejudice, and was therefore not a matter for him to complain of. It will be thus seen that the doctrine contended for derives no support or authority from that case. In *Tiff v. Tiff*, 4 Denio, 175, the action was brought to recover damages for the killing of a hog, by a dog which was set on by defendant's daughter; but the court held that the defendant was not answerable for the act of his daughter, done in his absence, and without his authority or approval; but the daughter,

whether an infant or not, was answerable for her own trespass. A parent cannot be held liable for the wilful trespasses and torts of his infant children, when he neither assents to nor ratifies them. When the minor has committed a tort, with force, he is liable at any age to be proceeded against as an adult. (Reeve, Dom. Rel. 386; 1 Chit. Pl. 66; *Jennings v. Randall*, 8 T. R. 335; Bacon, Abr. Infancy, H; *Loop v. Loop*, 1 Verm. 177; *Bullock v. Babcock*, 3 Wend. 391.) I know of no principle of law by which the action is maintainable. There is no such relation existing between father and son, though the son be living with his father as a member of his family, as will make the acts of the son more binding upon the father than the acts of any other person. The father is not liable for the contracts of the son, within age, except they be for necessities, and it would be a great departure from the law to hold him responsible for the son's trespasses and wrongs.

I think the demurrer was rightfully sustained, and the judgment will be affirmed. The other judges concur.

HAGERTY v. POWERS.

1885. 66 *California*, 368.¹

APPEAL from a judgment of the Superior Court of Sacramento County.

Action to recover damages for personal injuries to plaintiff's child. A demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, was sustained, and the plaintiff declining to amend, judgment was entered in favor of the defendant. The further facts are sufficiently stated in the opinion of the court.

Grove L. Johnson and *Jones & Martin*, for appellant.

Elwood Bruner and *S. P. Scaniker*, for respondent.

Ross, J. The question in this case is, whether the defendant, who, according to the averments of the complaint, "wilfully, carelessly, and negligently suffered, permitted, countenanced, and allowed" his son of eleven years of age, to have in his possession a loaded pistol, which pistol the boy afterwards so carelessly used and handled as to shoot the infant child of the plaintiff, is liable in damages therefor. We have been cited to no case, controlled by the principles of the common law, that holds that the action, under such circumstances, can be maintained. It seems that under the civil law it may be; and such an action was lately sustained by the Supreme Court of Louisiana, in the case entitled *Marionneau v. Brugier*, reported in the 16th volume of the Reporter, p. 208. Pothier, in his work on Obligations, says: "The doctrine that fathers and others shall be responsible for the acts of children under their care, which it was in their power to prevent,

¹ Arguments omitted. — ED.

appears highly reasonable ; but I am not aware of any case in which it is adopted in the *English* law." (Vol. 2, page 34.)

In *Tiff't v. Tiff't*, 4 Denio, 177, a minor daughter of the defendant, in her father's absence, and without his authority or approval, wilfully set his dog, not ordinarily a vicious animal, upon the plaintiff's hog, which was bitten and killed ; and the court held that the father was not, but the child was, liable in damages. To the same effect are a number of cases cited in Schouler on Domestic Relations, section 263, from which he deduces the rule that a father is not liable in damages for the torts of his child, committed without his knowledge, consent, or sanction, and not in the course of his employment of the child.

Under this rule it is quite clear that the averments of the complaint do not fix upon the defendant any liability for the damage suffered by the plaintiff.

Judgment affirmed.

SHARPSTEIN, J., THORNTON, J., MCKINSTRY, J., and MCKEE, J., concurred.

MYRICK, J., dissenting. I dissent. As the complaint alleges that the father wilfully, carelessly, and negligently countenanced his child in having the pistol, it is sufficient to show a cause of action.

HOVERSON v. NOKER.

1884. 60 *Wisconsin*, 511.¹

APPEAL from the Circuit Court for Kewaunee County.

The complaint contains two counts, one based upon injuries received by the plaintiff wife in the morning, and the other upon injuries received by her in the afternoon, of the 16th day of July, 1882. Such injuries were alleged to have been caused by the acts of the two sons of the defendant Frank Noker, who were then between eight and nine years of age.

The evidence given at the trial, and that excluded by the court, will sufficiently appear from the opinion. The Circuit Court held that there was no evidence upon the first count to go to the jury, and submitted to them certain questions for a special verdict, all of which related to the facts stated in the second count of the complaint. In answer to such questions the jury found that, as the plaintiffs were returning from church in the afternoon of the day in question, the two sons of the defendant Frank Noker made noises such as would naturally tend to frighten horses being driven along the highway in front of his house ; that such noises were made by them with the intention of frightening the plaintiffs' horses ; that the horses were frightened thereby, and ran or jumped, causing injury to the plaintiff Sarah Hoverson ; that the defendant Frank Noker did not direct his sons to make the noises, but

¹ Arguments and part of opinion omitted. — ED.

that he approved of their acts at the time. The jury also assessed the damages of Sarah Hoverson for the injury so sustained by her while returning from church, at five dollars.

Judgment upon the verdict was entered in favor of the plaintiffs for five dollars damages, and in favor of the defendants for costs. The plaintiff Sarah Hoverson appealed.

R. L. Wing, and *Timlin & Manseau*, for appellant.

Nash & Nash, for respondents.

TAYLOR, J. The plaintiffs in this action are husband and wife, and the defendants are father and his two sons. The action was in the nature of an action on the case for an injury to the wife, caused, as alleged in the complaint, by the joint acts of the defendants.

The evidence given on the trial shows pretty clearly that, while the plaintiffs were passing along the highway with their team and wagon, in front of the defendant's house, on a Sunday, going to church, the two young sons of the defendant Frank Noker came out of their father's house and fired off a pistol and shouted, and so frightened the plaintiffs' horses that they jumped suddenly forward and threw Sarah Hoverson out of the seat and injured her; and in the afternoon, on their return from the church, the boys again fired the pistol and shouted, and again frightened the plaintiffs' horses, but did not injure Mrs. Hoverson to as great an extent as in the morning.

The jury, under the instructions of the court, found a special verdict, and assessed the plaintiffs' damages at the sum of five dollars. From the judgment entered on such verdict Sarah Hoverson appeals to this court.

The case, though not involving any great amount of money, has been argued by counsel orally and in the submitted briefs with a degree of ability and care highly commendable.

The learned counsel for the appellant presents several points upon the rulings of the court upon the trial rejecting evidence offered by him, for which he claims the judgment should be reversed. It will be seen by an examination of the record that it became important for the plaintiffs to connect the father with the acts of his young sons, which the plaintiffs allege caused the injury complained of, and for this purpose the plaintiffs offered evidence tending to prove that the sons had frequently, before the day upon which the accident happened, called abusive names, shouted, and frequently discharged fire-arms when persons were passing the house of the defendants, and that this was often done in the presence of their father. All evidence of this kind was excluded. This, we are inclined to hold, was error. If the father permitted his young sons to shout, use abusive language, and discharge fire-arms at persons who were passing along the highway in front of his house, he permitted that to be done upon his premises which, in its nature, was likely to result in damage to those passing, and when an injury did happen from that cause he was not only morally but legally responsible for the damage done. If a parent permits his very young children to

become a source of damage to those who pass the highway in front of his house, he is as much liable for the injury as though he permitted them to erect some frightful or dangerous object near the highway which would frighten passing teams; and in such case he cannot screen himself by saying that he did not in words order the erection to be made. If he made it himself, with the intention to frighten passing teams, he would be responsible for the injury caused by it; and when he permits his irresponsible children to do it he is equally liable, because he has the control of his premises as well as of the children, and is bound to restrain them from causing a dangerous thing to be erected on his premises near the highway; and permitting his young sons to become an object of fright to teams passing, is certainly equally if not more reprehensible than permitting an inanimate structure to be placed where it would cause such fright. We think the evidence ought to have been admitted in order to connect the father with the acts of the young sons which caused the injury when the plaintiffs were on their way to church in the morning, as well as when on their return from the church in the afternoon.

The nonsuit in favor of the father upon the first cause of action stated in the complaint was, we think, improperly granted, even upon the evidence admitted by the court. There was at least some evidence admitted upon which the jury might have held the father liable for the acts done in the morning. On the case made by the plaintiffs, under the too strict rule held by the court as to the admission of evidence, there was still enough to carry the case to the jury upon both the causes of action stated in the complaint; at least, so far as the father was concerned.

The exceptions to the rulings as to the form of the special verdict need not be considered, as there must be a new trial for the errors above suggested. We deem it proper, however, to say that the judge, in his instructions upon the following question submitted to them, "Did the defendant Frank Noker direct his sons, the other two defendants, to make the noise they did when the plaintiffs were passing the house with their team?" fell into an error when he instructed them "that in order to answer this question in the affirmative they must be satisfied from the evidence that he by *word* so directed his sons to make the noise." This was too strict a limitation upon the subject. The evidence might have satisfied the jury that he directed the acts of his sons, but they might be unable to find evidence that he did so direct it by express words of command. Certainly no express command to do as they did was necessary to hold the father liable for their acts.

For the errors mentioned the judgment must be reversed.

By the Court. The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

CHAPTER VIII.

ILLEGITIMATE CHILDREN.

COOLEY v. DEWEY.

1827. 4 *Pickering (Massachusetts)*, 93.¹

THIS was an appeal from a decree of the Judge of Probate, ordering the estate of Darius Ely, deceased, intestate, to be distributed in equal shares between the several appellants and appellees, pursuant to a resolve of the Legislature passed on the 25th of February, 1825. Ely was the illegitimate son of Sybil Morgan, who died before him. He was never married. Abner Morgan and Eunice Cooley, the appellants, were the brother and sister of Sybil, and they claimed each a moiety of the intestate's estate as his next of kin and heirs at law.

Bliss, Sen., and *Lathrop*, for appellants.

E. H. Mills and *Ashmun*, *contra*.

PARKER, C. J. The merits of this appeal depend upon the question whether the mother of Darius Ely, he being a bastard, was, within the meaning of our statute of distributions, his next of kin; for, if she succeeded to his estate on his death, the two appellants, being her sisters, would of course take the whole between them, either as heirs of their sister Sybil, or through her as next of kin to the intestate.

It is not shown nor contended that, by the common law, their claim can be maintained, for there seems to be no maxim of that law less questionable than that a bastard is *filius nullius*. I do not know that it makes any difference whether the person claiming to succeed to a bastard be father or mother; there certainly is no express distinction of that sort. Whatever may be the grounds or policy of the law, they seem to apply as well to the mother as the father, except that there is greater certainty of the mother than of the father; but if it were the certainty only which originated this law, it might be supposed that it would have been left to depend upon proof of the fact, for in many cases the true father might be found with sufficient certainty. No doubt the law was so established on higher principles than the interest of individuals. It was to render odious illicit commerce between the sexes, and to stamp disgrace on the fruits of it; and though the pun-

¹ Arguments omitted. — ED.

ishment usually falls upon the innocent, yet it was thought wise to prohibit them from tracing their birth to a source which is deemed criminal by law and by religion. It is enough that those who have been the authors of this misfortune have the power to repair it by will or by gift; the law will not interpose. And if it will not for the benefit of the child, the only innocent party, surely it will not allow the guilty to found a claim of property upon a relation to the child whom they have exposed to these disabilities and privations. Our statute of distributions, though borrowed from the civil law, cannot be construed to have repealed the common law in this respect. It merely provides for the distribution of property according to the rules of that law, among lawful kindred, without adopting its principles in settling who shall compose that kindred.

It is by the grace and favor only of the Legislature that the appellants are entitled to anything, and they ought to be content to share a gift with others according to the will of the donor.

It was stated on the argument of this case that the Supreme Court of Connecticut had decided that an illegitimate child might inherit the lands of his mother. The case referred to had not then appeared in the printed Reports, but we have seen it since in the 5th volume of Connecticut Reports. It is the case of *Heath et ux. v. White*. In the opinion of the court, as expressed by Chief Justice Hosmer, the statute provision for descent of intestate estates controlled the common law, which it was admitted would not support such an inheritance, and considerable stress is laid upon the term "children," as used in the statute, instead of "lawful issue" or other more technical words of the common law. With the greatest respect for those learned judges, we are not able to adopt the opinion that our Legislature, in using the same term in our statute of descents and distributions, intended to apply the term to those who by the common law were not deemed children in a relative sense to parents; but we should think, if such had been their intention, an express provision would have been made for illegitimates. Nor do we see any particular reason for giving this construction of the term "children" in relation to the estate of the mother any more than to that of the father; for although the filial relation is more difficult of proof in the latter than in the former case, yet it is capable of proof, and there seems to be no other difference in the cases.

It is intimated in the case referred to, that the Legislature of Connecticut probably intended to adopt the principle of the civil law on this subject; but we are satisfied that such was not the intention of the Legislature of Massachusetts. They followed the English statute of distributions in regard to personal estate, and applied it to real estate as well as personal, without any design to deviate from the common law any further than is expressly provided by the statute. And it may be remarked, that in the statute of Charles the word "children" is used as in the Connecticut and Massachusetts statutes, but that illegitimate

children do not in England inherit or participate in the distribution. Mr. Justice Bristol dissented from the opinion of the court in the case upon which we have been commenting.¹

DICKINSON, ADMINISTRATRIX, v. NORTH EASTERN R'Y CO.

1863. 2 *Hurlstone & Coltman*, 735.

THIS is an action brought under the statute 9 & 10 Vict. c. 93,² by the plaintiff, as administratrix of Hannah Dickinson, deceased, on behalf of herself as the mother, and of William Dickinson as the child, of the said Hannah Dickinson.

The defendants pleaded that the plaintiff was not the mother, and the said William Dickinson was not the child, of the said Hannah Dickinson, deceased, as alleged.

At the trial, before Mellor, J., at the Durham Summer Assizes, 1863, it appeared that William Dickinson had been entirely maintained and supported by his mother Hannah Dickinson, but that he was an illegitimate child. Hannah Dickinson was the legitimate daughter of the plaintiff. The learned judge ruled that no damages could be recovered for the benefit of William Dickinson, and directed the jury to give damages for the plaintiff's benefit only.

Price now moved for a new trial, on the ground of misdirection. "Child," in the 2d section of the 9 & 10 Vict. c. 93, includes an illegitimate child. The Legislature intended the right of action to be coextensive with the moral right to support. The legal right to support cannot be the test of what class of persons can maintain this action. Under the Poor Laws a child, whether legitimate or illegitimate, has a legal right to support from his parent. But at common law he has no such legal right in either case. The 5th section of the 9 & 10 Vict. c. 93, which extends the ordinary meaning of the word "child" so as to include a

¹ The law on the subject of inheritance by, or from, illegitimate children has been materially changed by statute in many States. — *Ed.*

² Stat. 9 & 10 Vict. c. 93, § 1, gives an action against one who causes the death of a person by wrongful act, neglect, or default.

Section 2 provides: "That every such action shall be for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before mentioned parties in such shares as the jury, by their verdict, shall find and direct."

Section 5 provides: That the word "parent" shall include father and mother, grandfather and grandmother, and stepfather and stepmother; and that the word "child" shall include son and daughter, grandson and granddaughter, and stepson and stepdaughter. — *Ed.*

stepchild, shows that the benefit of the enactment is not confined to blood relations. In *Dickenson v. Wright*, 5 H. & N. 401, and in error *Clarke and Others*, representatives of *Dickenson*, deceased, v. *Wright*, 6 H. & N. 849, the moral obligation of a mother to provide for her illegitimate children was considered in the judgment of both courts to be as binding as if the children were legitimate. The point there decided was, that a limitation in a marriage settlement to an illegitimate child of the settlor was not void against subsequent purchasers under 27 Eliz. c. 4. For many purposes the law recognizes the relationship of a bastard to his parent. Thus a marriage within the prohibited degrees of consanguinity or affinity is not the less null and void because one of the parties is illegitimate: *Haines v. Jeffel*, 1 Ld. Raym. 68; *Regina v. Brighton*, 1 B. & S. 447. Illegitimate children have been held to take under a devise to "children": Jarman on Wills, 3d ed., vol. 2, c. 31, p. 211, citing *Gill v. Shelley*, 2 Russ. & My. 336. [BRAMWELL, B. In that case the devise was to the children of a person who, before the will was made, had died, leaving only one legitimate child, and one illegitimate. POLLOCK, C. B. In Hawkins on the Construction of Wills, c. 8, p. 80, the rule is thus stated: "A gift to children means *legitimate* children only, unless it appears, from the context or from circumstances, that illegitimate children must have been intended." But beyond all doubt in the construction of this act of Parliament the word "child" means legitimate child only.] He also referred to *Follit v. Koetzow*, 29 L. J., M. C. 128.

PER CURIAM. POLLOCK, C. B., BRAMWELL, B., CHANNELL, B., and PIGOTT, B. The rule must be refused. *Rule refused.*

HAINS v. JEFFELL.

7 William 3d. 1 Lord Raymond, 68.

A DAY was appointed to hear counsel, why a prohibition should not be granted to the spiritual court of Worcester, to stay a suit against Hains for marrying with the bastard daughter of his sister. And Sir Bartholomew Shower for the prohibition argued, that it was not prohibited by any law, for there was neither affinity nor consanguinity, for a bastard is *nullius filius*. Co. Lit. 123, a, 157, a. It is no consideration to raise a use. 41 Ed. 3, 19; Old Bendl. 102. Dobbins *e contra*, that the original is, *ad proximam sanguinis non accedat*; that the Jews made no difference, as to marriage, between bastards and others. Seld. *de jure Hebr.* li. 5; cap. 10; fol. 591. Puffend. li. 6, c. 1, par. 31; Zepper, li. 4, c. 19, p. 502. It seemed to the court that no prohibition should be granted, for though bastards are deprived of privileges by particular laws, the same reason pro-

hibits them from marrying, as others. And it has been always held accordingly, especially where it is the child of a woman relation. And by Sir *Bartholomew Shower's* rule Hains might marry his own bastard, which doubtless could not be allowed. *Adjournatur.*

MARSTON v. JENNESS.

1840. 11 *New Hampshire*, 156.¹

COMPLAINT, under the "act to provide for the maintenance of bastard children," which came before the court upon an agreed statement of facts.

James Bell, for complainant.

Bartlett, for respondent.

GILCHRIST, J. Upon the facts agreed in this case, a question arises as to the effect of the former examination and discharge by the magistrate; and in order to determine this point it may be necessary to inquire into and settle another question, which is, whether the proceedings under this act are of a civil or criminal character, and whether the final order of filiation that may be made in such cases, is in the nature of a punishment for an offence, or merely of an indemnity against certain pecuniary losses that may be sustained by the town chargeable with the support of the child.

The fourth section of the act provides, that the person found chargeable shall be ordered to pay such sums to the mother, or, where the court deem it proper, to the selectmen of the town liable to maintain the child, to be applied for its maintenance, as the court may judge reasonable; and he shall also be ordered to pay the costs of the prosecution. And he may be further ordered to give security to save the town harmless from the maintenance of the child. If he refuse to obey the order of court, he may be committed to prison until the same be obeyed.

The fifth section provides, that if the complainant shall abandon her complaint, the town may be admitted to prosecute, and procure an order upon the respondent to give security as aforesaid. If he be found chargeable, he shall be ordered to give security to save the town harmless. If not chargeable, he shall be allowed costs, and have execution therefor against the town.

The seventh section provides, that if any person committed to prison under this act be poor and unable to pay such sums, or procure such sureties as the court shall order, the court may discharge him upon such conditions as they think proper.

It is to be observed, that the object of all the foregoing provisions is, to cause the respondent to furnish an indemnity to the town against such expenses as may be incurred by supporting the child, and to pay

¹ Statement abridged. Part of opinion omitted. — Ed.

such sum to the mother for its maintenance as may be deemed proper by the court. If the complainant should not be pregnant, although the fact of illicit intercourse should be proved the respondent would be released from his liability to pay any sums to the mother, or furnish any security to the town. And this is a strong argument for the position that the act is not to be construed as imposing any punishment upon the respondent, or as at all penal in its character. If he be committed, and be poor and unable to comply with the order of court, he may be discharged from imprisonment by a provision similar to that which authorizes the Court of Common Pleas to remit fines and costs imposed upon persons in gaol upon convictions of criminal offences. But the order of court is not a sentence upon a conviction for a crime. It imposes no disability whatever. It does not interfere with the political or legal rights of the respondent. The power of pardoning offences is by the constitution vested in the governor and council. If the verdict of the jury establish the fact that the respondent has committed a crime, such offence may be pardoned by the executive. But the executive could interfere, not to restore to the party the rights of which a conviction has deprived him — for he has incurred no disability — but merely to annul the order of court, that he should furnish security, and that in all cases, whether the respondent were or were not unable from poverty to comply with the order. It will hardly be contended that the respondent is a criminal, in a sense which authorizes the interference of the executive, when such a result would follow, so entirely opposed to the beneficial operation of the statute.

It is further to be remarked, that the offence against religion and good morals which has been committed by the respondent, is punishable by a separate statute. The crimes of adultery and fornication are punishable by virtue of the second and fourth sections of the act of 1829. 1 N. H. Laws 147. And these provisions seem to give additional support to the position that the object of the act under consideration was not in any degree the punishment of offences.

In the case of *Hill v. Wells*, 6 Pick. R. 104, Mr. Justice Morton analyzes, with great clearness, the proceedings upon a complaint of this description, and points out those particulars which partake of a civil character, and those which are more analogous to criminal prosecutions. The first and principal question before the court was, whether the municipal court, which had "cognizance of all crimes and offences committed within the town of Boston," had jurisdiction of cases arising under the bastardy act. In this opinion it is said, that "this process being neither wholly civil nor wholly criminal, but having many of the features and incidents of each, we are left to determine, from the manner in which the Legislature has treated it, whether they intended to include it in one or the other class of suits. And they might well, in some respects, treat it as a civil, and in others as a criminal suit."

After stating that in the ancient statutes it is classed with "crimes and offences"; that in 1692 the provincial Legislature included provi-

sions in relation to bastardy in "an act for the punishing of criminal offenders," and that cognizance of this subject has, for nearly two centuries, been vested in a court of criminal jurisdiction, the opinion of the court is declared to be, "that in the transference of the powers of the court of sessions to the municipal court, by the act of 1799, the Legislature intended to include all cases arising under the statute of bastardy."

We see no reason to doubt the correctness of this opinion; and yet it does not follow that because a court of criminal jurisdiction has cognizance of such a complaint it is a criminal proceeding, in the ordinary and legal sense of the word. "It has many of the properties and characteristics of a criminal suit. It is founded upon a complaint made under oath. It is commenced by a criminal *capias* or warrant. It is returnable immediately upon the arrest of the defendant. He is not entitled to any previous stated notice, as in civil actions. It is returnable to a court of inquiry. The officer making the arrest cannot take bail. The defendant is bound to answer *instanter* upon being brought before the magistrate; and, if there is probable cause for the prosecution, he is bound over for trial, and upon his failure to give bonds he is committed."

So, many of the rules which govern civil actions are applicable to it. It is commenced by and in the name of an individual, and not in the name of the State. It may be amended, as in civil suits. Although the complainant is a competent witness, she cannot be compelled to make complaint, or to testify in the cause. The defendant is not arraigned, but appears and pleads by attorney; and, if he is discharged, is entitled to costs, as the prevailing party. The object of the suit is the redress of a civil injury. It is to compel the putative father to aid the mother in the support of the child, and to provide security to the town liable to maintain it. These characteristics of the proceedings are enumerated in the case of *Hill v. Wells*, above cited.

It is evident, we think, from these considerations, that the object of the statute is not to impose a punishment for an offence, but to redress a civil injury. For the purpose of affording this redress, the Legislature, as they undoubtedly may in all cases of civil injury, have deemed it expedient to authorize the employment of process usually applicable to criminal proceedings alone. But the process is merely the form by which the redress is sought. The purpose to be obtained is an indemnity. As soon as this indemnity is furnished the object of the law is satisfied, without affixing any stigma upon the character of the respondent, as in criminal convictions. And in other States it is regarded as a civil remedy. *Mariner v. Dyer*, 2 Greenl. 165; *Hinman v. Taylor*, 2 Conn. 357.

We are, therefore, of opinion that the rules of civil proceedings are applicable to complaints under this act, and that they are substantially civil suits, although some of their forms are adopted from the criminal law.

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SIMMONS v. BULL.

1852. 21 *Alabama*, 501.

ERROR to the Chancery Court of St. Clair.

Heard before the Hon. E. D. Townes.

This bill was filed by the plaintiff in error, by his next friend, against the defendant. It alleges, that the complainant, an infant, is a bastard, begotten by the defendant, and that he had removed beyond the limits of this State in order to avoid the statutory liability for its support, leaving property of value in this State, out of which the bill prays that provision may be made for the complainant's support. The Chancellor dismissed the bill for want of equity, and his decree is now assigned for error.

Rice & Morgan, for plaintiff in error.

The proceeding in bastardy, authorized by our statute, is not strictly of a criminal character. The bond in such case assimilates itself, in its legal effect, quite as much to a bail bond in a civil case, as to a recognition in a State case. 3 Metcalf, 210; 13 Pick. 289; 26 Maine, 382; 16 Ala. 600; ib. 804. The appearance of the defendant was not indispensable to authorize the County Court to determine the question of filiation. He could not at pleasure arrest the course of the court. 4 Ala. 328. The act of 1811 has been so far modified by the act of 1816, as only to make it necessary to submit the case to a jury when the reputed father demands it. 4 Ala. 331; 15 ib. 556.

The statute law of Alabama makes it the duty of the court, if the issue is found against the reputed father, to condemn him to pay not exceeding \$50 a year for ten years, "towards the maintenance and education of such child," . . . "so that the same be not paid to the mother of such child." Clay's Dig. 134, § 4. A plea of guilty, or a confession of the act by the reputed father, is equivalent to finding the issue against him. *Pruitt v. Judge*, 16 Ala. 707. A decree *pro confesso* against a non-resident defendant is equivalent to a confession of the matter as charged. *Arnold v. Sheppard*, 6 Ala. 299. Even if it be admitted that the mother may make a compromise before the issue is tried, that fact would only prove that the proceeding is not a criminal, but only a civil suit.

The right of the child to a sum of money "for maintenance and education" is given by statute, subject only to be compromised before judgment by the mother, who is expected to support and maintain the child. *Robinson v. Crenshaw*, 2 S. & P. 276. But if there was any such compromise, it must be set up as a defence. The court cannot presume, as against the child, that its mother has compromised away its rights, when the defendant does not say so.

Can the defendant, by his flight alone, defeat the operation of the statute, and the right thereby given to the child? Is the statute to be

confined only to that class of persons who are willing to remain here, to answer the violated law? Shall the absconding offender gain the mastery over the law, while his property is here in the power of a court of chancery? Shall no order or decree be made to subject this property to "the maintenance and education" of the child, when all the defendant's rights will be protected by the usual bond in favor of non-resident defendants? Clay's Dig. 353, § 45; 9 Ver. 134. Whenever the law gives a right to any property, or to its enjoyment in future, and all remedy at law is destroyed by the voluntary act of a wrongdoer, and when there will be a failure of justice, and irreparable injury, without the aid of a court of equity, that court will exercise its transcendent powers. Reavis's Dig. 247, §§ 153 *et seq.*

Where a wife had filed a bill for alimony, &c., against her husband, and it appeared that he had abandoned her without any support, and threatened to leave the State, the court, on the petition of the wife, granted a writ of *ne exeat* against him. 1 Johns. Chan. R. 264. The Court of Chancery has power to aid a judgment and execution creditor, to discover and reach the property of his debtor, whenever it has been put out of the reach of an execution at law. 20 Johns. 554; 5 Johns. Chan. R. 280; 4 ib. 687. A complainant who, by accident, is prevented from obtaining relief at law where he has it complete, may be relieved in chancery. 2 Hen. & Mun. 10. As to what is meant by "accident" in a court of chancery, see Story's Eq. Juris. § 78; Jeremy's Equity, B. 3, Part 2, 358.

Walker & Martin, contra.

The father is under no legal obligation, at common law, to maintain his illegitimate offspring. His liability is only of statutory creation, which prescribes the remedy to be pursued; and none other can be. 16 En. Com. Law R. 302; 19 Wend. 405; Kent's Com. vol. 2, 215. The statutory remedy is strictly penal, and must be literally pursued. 22 Ver. 543.

The obligation of the father to maintain his legitimate children results from his right to their custody and services, while he can exercise no authority or control over his illegitimate children. Kent's Com. vol. 2, 215; 8 N. H. 417; 6 Ala. 501; 17 ib. 14.

CULTON, J. This was a bill filed by an infant by its next friend, charging that it was a bastard, begotten by the defendant, who, to avoid the statutory liability for its support, has removed beyond the jurisdiction of this State, leaving property belonging to him in the county of St. Clair. The bill prays that publication may be made, and that provision may be made for the support of the infant out of the property of the defendant. The Chancellor dismissed the bill for want of equity.

At the common law, a bastard was said to be *filius nullius*. His natural father may die ever so rich, and he may be upon the parish, yet he took none of his estate, unless left to him by will. In the absence of a statute, the father is under no legal obligation to support him; and the

statute prescribes the mode, and the only mode, by which this support can be obtained. The case before us shows the necessity for further legislation on the subject. Our duty, however, is plain; as we have no power to make, but only to administer the law, and there is no provision of either the common or statute law authorizing this proceeding, the Chancellor properly dismissed the bill, and his decree must consequently be affirmed. See 16 Eng. Com. Law R. 302; 19 Wend. 405; 2 Kent, 215.

Decree accordingly.

BARNARDO v. McHUGH.

1891. *Law Reports* (1891), *Appeals*, 388.¹

APPEAL from two orders of the Court of Appeal, one as to the issue of a *habeas corpus*, and the other as to the appointment of a guardian, reported as *Reg. v. Barnardo, Jones's Case*, [1891] 1 Q. B. 194. The circumstances were as follows:—

The respondent, Margaret McHugh (formerly Roddy), was the mother of an illegitimate boy (called John James Roddy, and sometimes Jones,) by a man named Jones with whom she lived for about twenty years. The boy was born in December, 1878, baptized in a Roman Catholic church in 1880, and again baptized in a Protestant church in 1884. In 1886 the respondent married a man named McHugh. In June, 1888, the boy was admitted into one of the Homes for Destitute Children, of which the appellant, Dr. Barnardo, was the founder and director under a committee, the mother signing an agreement to leave the boy under the care of the managers of the Homes to be maintained and educated for twelve years, and not to remove him during that period without their consent. In January, 1890, the appellant was required, in accordance with an authority signed by the mother, to deliver the boy to a person named by her. The appellant having after some correspondence refused to do so, a rule *nisi* was obtained calling on him to show cause why a writ of *habeas corpus* should not issue commanding him to bring up the body of the boy before the court.

The Queen's Bench Division (Lord Coleridge, C. J., and Mathew, J.) after argument made this rule absolute and also made an order appointing a Mr. Walsh, a Roman Catholic, nominated by the mother, guardian of the person of the boy. Both these decisions were affirmed by the Court of Appeal (Lord Esher, M. R., Lindley and Lopes, L. JJ.), [1891] 1 Q. B. 194.

Finlay, Q. C., and *W. Baker*, for appellant.

Murphy, Q. C., and *Joseph Walton* (*Forbes Lankester* with them), for respondent.

¹ Statement abridged. Arguments omitted. — ED.

LORD HERSCHELL.¹ . . . The question principally discussed at your Lordships' Bar was whether the mother of an illegitimate child has a legal right to its custody. It was contended on behalf of the appellant that she has no such right; whilst on the other side it was argued that her rights are the same as those which a father possesses with regard to his legitimate children. In the courts below the latter proposition appears to have been considered to be established by the authorities. I do not feel satisfied that the authorities do establish that proposition.

It is true that in the case of *Ex parte Knee*, 1 B. & P. (N. R.) 148, where application was made for a writ of *habeas corpus* with a view to delivering to its mother the custody of an illegitimate child who had been placed with a third person by the putative father, Mansfield, C. J., said that the mother was entitled to the child if she insisted on it, unless some ground was shown by the affidavits to prevent her having the custody; but in the case of *R. v. Moseley*, 5 East, 224, n., which came before the court about the same time, Lord Kenyon said: "Where the father" (he was speaking of the putative father of an illegitimate child) "has the custody of a child fairly, I do not know that this court would take it away from him; but where he has got possession of the child by force or fraud, as is here suggested, we will interfere to put matters in the same situation as before." The same learned judge had in a previous case of *R. v. Soper*, 5 T. R. 278, restored a child to the custody of a mother at her instance where the putative father had obtained possession of it by fraud. I do not gather that in either of these cases Lord Kenyon acted upon the view that the mother of an illegitimate child had an absolute legal right to its custody, but only that the court would intervene where she had been deprived of that custody by force or fraud; and in the case of *R. v. Hopkins*, 7 East, 579, two years after the decision of Sir James Mansfield in *Ex parte Knee*, 1 B. & P. (N. R.) 148, where a writ of *habeas corpus* was moved for by the mother of an illegitimate child which had been taken from her custody by force, Lord Ellenborough expressed some doubt, upon the opening of the case, "whether the court could interfere on behalf of the mother of an illegitimate child, who had no legal right to the person of the child," and said that "the question of guardianship belonged to another forum, with which this court could not interfere." On the following day, in granting the writ, Lord Ellenborough said: "We think that this is a proper occasion for the court by means of a remedial writ to restore the child to the same quiet custody in which it was before the transactions happened which are the subject of complaint; leaving to the proper forum the decision of any question touching the right of custody and guardianship of this child, with which we do not meddle."

In the case of *Reg. v. Nash*, 10 Q. B. D. 454, to which I shall have occasion to refer hereafter, it was not necessary, as was there pointed out, to determine whether the mother of an illegitimate child had, according to the common law, a right to its custody, the court exercising

¹ The opinion of Lord HALSBURY, L. C., is omitted. — ED.

an equitable as well as legal jurisdiction, and being governed by the rules of equity.

It seems to me that there was in former times a disposition to carry out rigorously to its logical conclusion the doctrine that an illegitimate child was *filius nullius*, and to hold that no one possessed in relation to it the full parental rights which the law recognizes in the case of legitimate offspring. When Maule, J., in the case of *In re Lloyd*, 3 M. & G. 547, asked, "How does the mother of an illegitimate child differ from a stranger?" it does not appear to me that he was speaking ironically, but rather stating bluntly this legal doctrine. But whatever may have been the view in former times, I cannot but think that the legislation embodied in the Poor Law Act (4 & 5 Will. 4, c. 76, s. 71) renders it impossible in the present day to regard the mother of an illegitimate child as destitute of any rights in relation to its custody. The obligation cast upon the mother of an illegitimate child to maintain it till it attains the age of sixteen appears to me to involve a right to its custody.

It is, however, no longer important to inquire what are the rights of the mother in relation to an illegitimate child at common law. All the courts are now governed by equitable rules, and empowered to exercise equitable jurisdiction. As was said by Sir George Jessel, M. R., in *Reg. v. Nash*, 10 Q. B. D. 454: "In equity regard was always had to the mother, putative father, and relations on the mother's side." In that case the mother of an illegitimate child sought to have it delivered to her in order that it might be placed under the care of her sister. The child was in the custody of the wife of a laboring man, with whom it had been placed by the mother, who was living with another man as his mistress. The court, notwithstanding the opposition of the person in whose custody it was, ordered that the child should be delivered into the custody desired by the mother. I think this case determines (and I concur in the decision) that the desire of the mother of an illegitimate child as to its custody is primarily to be considered. Of course, if it can be shown that it would be detrimental to the interest of the child that it should be delivered to the custody of the mother or of any person in whose custody she desires it to be, the court, exercising its jurisdiction, as it always does in such a case, with a view to the benefit of the child, would not feel bound to accede to the wishes of the mother.

The principles on which the court ought to act on the application for the custody of an illegitimate child being thus, to my mind, free from doubt, I proceed to inquire how they ought to be applied to the present case.

[Omitting remainder of opinion.]

Orders appealed from affirmed, and appeal dismissed with costs.

[Lord FIELD and Lord HANNEN concurred.]

INHABITANTS OF MONSON v. INHABITANTS OF PALMER.

1864. 8 *Allen* (Massachusetts), 551.

CONTRACT to recover for the support, as paupers, of Julia Ann Calkins and her seven children. The case was tried in the Superior Court, before Vose, J., and reported for the determination of this court, upon facts which are stated in the opinion.

J. Wells, (*H. Morris* with him,) for the plaintiffs.

P. C. Bacon, (*J. G. Allen* with him,) for the defendants.

HOAR, J. [Omitting part of opinion.] But the more difficult question remains, and will present itself on the assessment of damages. That question is, whether children who were illegitimate at the time of their birth, but whose parents afterward intermarry, and their father acknowledges them as his children, acquire thereby the settlement of the father? It appears by the report that four of the children of Calkins, for whose support as paupers the plaintiffs claim compensation, were born between 1849 and 1856; that Calkins had at that time a lawful wife living, from whom he was divorced in 1856; and that he then married the mother of the children, and acknowledged them as his own.

At the time of their birth, these children were illegitimate, and therefore had the settlement which their mother then had, which it is not contended was in Palmer. St. 1793, c. 34, § 2. *Boylston v. Princeton*, 13 Mass. 381. Rev. Sts. c. 45, § 1. This was the rule expressly established by the statute of 1793; and it has been held that the law was the same as to illegitimate children born before the statute of 1789. *Blackstone v. Seekonk*, 8 Cush. 75, and cases there cited. By St. 1789, c. 14, § 3, illegitimate children took and followed the settlement of their mother until they should gain one of their own. *Petersham v. Dana*, 12 Mass. 429.

The first provision for inheritance by illegitimate children was made by St. 1828, c. 139, as follows: "Every illegitimate child shall be considered an heir at law of its mother, and inherit as such when she shall die intestate." *Cooley v. Dewey*, 4 Pick. 93. The same statute provided that the mother should in like manner inherit from the child. This statute applied exclusively to intestate estates; and was substantially re-enacted by Rev. Sts. c. 61, § 2, with an express limitation against any claim by right of representation. This limitation was afterward modified by St. 1851, c. 211, so as to allow an illegitimate child to inherit from any maternal ancestor. But it was held in *Kent v. Barker*, 2 Gray, 535, that, in regard to testate estates, illegitimate children were not to be regarded as children in the construction of statutes. In the opinion given by Thomas, J., however, it is expressly noticed that the decision does not affect the case of an illegitimate child, when the parents marry after its birth, and the father after the marriage acknowledges the child.

A particular provision for the case last named was originally made by St. 1832, c. 147, entitled "An act in further addition to an act regulating the descent and distribution of intestate estates." If the parents had other children born after the marriage, the children were made to inherit from each other, and the mother from the children, as if all had been born in lawful wedlock. The commissioners appointed to revise the statutes reported this enactment as a section in the chapter entitled "Of title to real property by descent," and without essential modification, except allowing the father as well as the mother to inherit from the children. In a note, they called the attention of the Legislature to the fact that the statute was inoperative, unless there were other children born after the marriage; but said that they had no means of conjecture whether this was accidental or designed, as they knew not the reasons on which the statute itself was founded, "it being an innovation upon the law as immemorially practised, and transmitted to us by our ancestors;" and left it "to the wisdom of the Legislature, if they should see fit to continue this law in force, to modify it in such manner as should be thought proper." The Legislature did not adopt the obvious tendency of these suggestions; but, on the contrary, extended the operation of the section as reported by the commissioners, and enacted it in these terms: "When, after the birth of an illegitimate child, his parents shall intermarry, and his father shall, after the marriage, acknowledge him as his child, such child shall be considered as legitimate to all intents and purposes, except that he shall not be allowed to claim, as representing either of his parents, any part of the estate of any of their kindred, either lineal or collateral. Rev. Sts. c. 61, § 4. So far the subject was treated only in connection with the descent of property.

But St. 1853, c. 253, was entitled simply "An act concerning illegitimate children whose parents intermarry;" and it enacts that, "when, after the birth of an illegitimate child, his parents have intermarried or shall intermarry, and his father has acknowledged, or shall, after the marriage, acknowledge him as his child, such child shall be considered legitimate to all intents and purposes." By the second section, "the fourth section of the sixty-first chapter of the Revised Statutes, and all acts inconsistent herewith, are hereby repealed." This statute is substantially retained in the General Statutes, with the omission of the words "to all intents and purposes;" and is found in § 4 of c. 91, "of title to real property by descent;" but there is no intimation from the commissioners who revised the statutes that any change in the law was intended.

The case at bar is governed by the statute of 1853. Its terms are as broad and general as the language affords. And we do not think there is such evidence that the intention of the Legislature was to confine their application to the single subject of the descent of property, as will authorize this court to interpret it in any narrower sense by implication, than that which the import of the language used naturally suggests.

In considering the probable reasons which led to the passage of the

law, it is to be noticed that the consanguinity is established, for all purposes of lineal or collateral transmission of property, by evidence which the law deems conclusive. It cannot be supposed that the right of the father to the obedience and services of the child, and the corresponding obligation of protection and support, were not designed. The parents having remedied the wrong occasioned by their illegal and immoral conduct, to the extent of their power, by the marriage, it may well be supposed that the Legislature intended to remove the stigma which had attached to the innocent offspring. We can see no reason, on the contrary, why children taken to be legitimate for all other purposes should not have the settlement of their father. That they should have it is consistent with the letter of the law in every particular; and, while the pauper laws are a system of fixed rules which are to be steadily applied without much latitude of construction, yet if we look into the general objects and purposes for which they are framed, it is equally consistent with these.

It is no sufficient objection that this construction may change the settlement of children, already acquired. That consequence has not unfrequently happened, under the operation of causes over which towns have no control. Under the St. of 1789, the marriage of the mother would of itself have changed the settlement of her illegitimate children. Under St. 1793, legitimate children, having the settlement of their mother, followed the settlement which she acquired by another marriage. *Plymouth v. Freetown*, 1 Pick. 197. The whole subject is very clearly and fully discussed by Mr. Justice Metcalf, in discussing the somewhat analogous case of a legislative enactment limiting the evidence admissible to show the invalidity of a marriage, in the recent case of *Goshen v. Richmond*, 4 Allen, 458; and cases are there cited from Maine and Connecticut, in which it has been held that an act of the Legislature, sanctioning an informal marriage, was valid; and that the settlement of the children of the marriage, already born, would be thereby transferred, under the operation of the pauper laws, to the town of the father's settlement. *Lewiston v. North Yarmouth*, 5 Greenl. 66. *Goshen v. Stonington*, 4 Conn. 209.

Except so far as the change of settlement is concerned, there is no retroactive effect of the statute of 1853 which bears upon the parties to this suit. The supplies were not furnished by the plaintiffs till after the legitimacy of the children had been established.

We have examined carefully the statutes in relation to the support of poor persons by their kindred; Gen. Sts. c. 70, § 4; and to the adoption of children; Gen. Sts. c. 110; but do not find in them anything which tends to vary the conclusion to which we have arrived.

The result is that there must be a judgment for the plaintiffs for such sum as an assessor shall find is due to them for relief furnished to the wife and all of the seven children of Calkins.

CHAPTER IX.

ADOPTION.

IN THE MATTER OF THE PROBATE OF THE WILL OF JOSEPH
THORNE.BRANTINGHAM *v.* HUFF.1898. 155 *New York*, 140.¹

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered December 17, 1897, affirming an order of the Surrogate's Court of Westchester County, dismissing the petition of the appellant for leave to intervene and file objections to the probate of the will of Joseph Thorne, deceased.

The facts, so far as material, are stated in the opinion.

Alex. Thain, for appellant.

W. P. Prentice, for respondent.

BARTLETT, J. The petitioner, May Thorne Brantingham, the appellant, seeks to intervene in the matter of the probate of the will of Joseph Thorne, deceased, on the ground that she is his lawfully adopted child, and interested in the distribution of his estate. It is found by the Surrogate's Court of Westchester County, that on the 21st day of December, 1863, at the city of New York, Joseph Thorne and Elizabeth, his wife, attempted to adopt the petitioner when she was one year and eleven months old (her father being dead), with the consent of her mother and the superintendent of the out-door poor, acting on behalf of the commissioners of public charities and correction of the city of New York.

This act of attempted adoption is established by the production of a written indenture or agreement, duly executed, to continue until the infant attained the age of eighteen years.

It is further found that, in pursuance of this agreement, the petitioner became a member of the household of Joseph Thorne and Elizabeth, his wife, and that they maintained the relation of foster parents toward her down to the time of their death in the year 1897.

These findings were followed by the legal conclusion that the relation of adopted child and foster parents was not established by this

¹ Arguments omitted. — Ed.

agreement, for the reason that, at the time of its execution, there was no statute in this State authorizing such an adoption. The petition was dismissed.

The Appellate Division affirmed the order of the Surrogate's Court.

The adoption of children and strangers to the blood was known to the Athenians and Spartans, the Romans and ancient Germans.

This subject is discussed by many writers. The provisions of the Roman law, as modified by Justinian, were transmitted to the modern nations of Europe, and appear in the Code Civil of France and in the Spanish law. 31 Cent. L. J. 66.

This form of domestic relation was, however, unknown to the common law of England, and exists in this country only by virtue of statute. *Morrison v. Sessions' Estate*, 70 Mich. 297-305; *Ballard v. Wurd*, 89 Pa. St. 358; *Abney v. De Loach*, 84 Ala. 393; *Carroll v. Collins*, 6 App. Div. 106.

The first general statutory provision in this State is contained in the Laws of 1873 (ch. 830), entitled "An Act to legalize the adoption of minor children by adult persons." This act, after providing for adoption in detail, contains in its last section this saving clause: "Nothing herein contained shall prevent proof of the adoption of any child, heretofore made according to any method practised in this State, from being received in evidence, nor such an adoption from having the effect of an adoption hereunder."

The 10th section of the act provides that the child should have all the rights, and be subject to all the duties, of the relation of parent and child, except the rights of inheritance. Subsequently this section, by Laws of 1887, chapter 703, was amended so as to confer the rights of inheritance. These statutory provisions remained in force until the enactment of the Domestic Relations Law (ch. 272, Laws 1896, sections 60 to 68).

These, in brief, are the general statutory provisions in this State in the matter of adopting minor children, and it is obvious that the attempted adoption of the petitioner in 1863 was without legal sanction, unless it be true, as is contended by counsel for the appellant, that the saving clause, already quoted from the Act of 1873, was intended to legalize all private agreements for adoption previously executed. While there has been some diversity of opinion in the lower courts as to the precise meaning of this clause, we think the only construction permissible is that it refers to those forms of adoption theretofore existing by virtue of special statutory enactments contained in the charters of charitable societies that received destitute and homeless children, and whose officers were permitted to execute agreements of adoption on their behalf with suitable persons willing to assume the obligations of parents. This is illustrated by the act to incorporate the American Female Guardian Society, a well-known charitable institution in the city of New York. Ch. 244, Laws of 1849. Section 6 of this act provides, in substance, that where a child is surrendered to the manage-

ment of the society, it shall be lawful for the board of managers, in their discretion, to place such child by adoption or service in some suitable employment, and with some proper person or persons.

It is obvious that the Legislature did not have in contemplation the legalizing of private agreements executed without authority of law, and containing no safeguards or restrictions of any kind as to the transmission of property. Any such construction of the saving clause in the Act of 1873 might seriously affect the titles to real estate, and introduce many elements of danger.

It follows that the agreement in this case, relied on to create the relation of foster parents and adopted child, worked no such result, and that the order appealed from should be affirmed with costs.

All concur except GRAY, J., absent.

Order affirmed

PART SECOND.

INFANT.

[“An infant, in the legal intendment of the term, is one that has not yet arrived at majority, . . .” Eversley’s Domestic Relations, 2d ed. 711. “The time at which a person is considered to attain full age must necessarily be somewhat arbitrarily chosen.” Simpson’s Law of Infants, 2d ed. 1. “The age of twenty-one is the period of majority for both sexes, according to the English common law, and that age is completed on the beginning of the day preceding the anniversary of the person’s birth. The age of twenty-one is probably the period of absolute majority throughout the United States, though female infants, in some of them, have enlarged capacity to act at the age of eighteen.” 2 Kent’s Com. star page 233.

“In most states, except for marriage, a person, whether male or female, is deemed of age at twenty-one; and so where the laws are silent.

“But in many, a woman is of age at eighteen; a man, at twenty-one.

“And in several, a woman of any age, when lawfully married, may exercise all the powers of a married woman as if of full age. . . .

“And in several, all minors, male or female, attain their majority by marriage.”

1 Stimson’s “Amer., Statute Law. In force January 1, 1886.” Section 6601.

The learned editor, in connection with the above statements, gives numerous references to statutes.

As to statutes relating to the capacity of minors to make wills, see 1 Stimson, Section 2602.]

CHAPTER I.

CAPACITY TO ACT AS PUBLIC OFFICIAL, OR PRIVATE AGENT.

MOORE v. GRAVES.

1826. 3 *New Hampshire*, 408.¹

TRESPASS *de bonis asportatis*, for the taking by defendant of goods which plaintiff, acting as a special deputy of the sheriff, had previously attached and locked up. Plaintiff, who was then under twenty-one, was specially deputed to serve and return a particular writ of attachment against Jones (*M'Neil v. Jones*); the deputation being written on the back of the writ and signed by the sheriff. Defendant Graves subsequently caused the goods to be attached and removed by a general deputy of the sheriff, acting under a writ, *Graves v. Jones*.

A verdict was taken by consent for plaintiff, subject to the opinion of the court.

Burnam & Woodbury, for plaintiff.

Story, for defendant.

RICHARDSON, C. J. . . . The first question, then, to be decided is, whether the plaintiff, being an infant, was, by law, capable of discharging the duties, which he was, in this instance, deputed to perform? It is not necessary, in this case, to decide whether he was capable of doing all the duties of a general deputy; his authority being special and limited, it is enough for this case to decide the question, whether he was, by law, capable of doing the particular acts, which his commission authorized him to perform?

The real question, then, involved in this point, is, whether an infant is, by law, capable of discharging the duties of a deputy of the sheriff, specially deputed to serve and return a particular writ of attachment?

There are provisions in our constitutions, which declare persons, of certain ages, incapable of holding certain offices. These provisions have been adopted, because it has been generally supposed to be contrary to sound public policy to commit particular offices to the inexperience of the young, or to the decay of faculties, which so frequently

¹ Statement abridged. Only so much of the opinion is given as relates to a single point. — Ed.

Woods v. Grove

*Doubtful conclusion
Reasoning good.*

FACTS:- Trespass for taking by D of goods which P, acting as deputy sheriff, had attached and locked up. P was a minor. D later caused goods to be attached and removed by general deputy of the sheriff.

ISSUE:- Question is whether an infant is, by law, capable of discharging the duties of a deputy sheriff.

General rule is that offices which require judgment, discretion, and experience cannot be held by infants; but they may hold offices which are ministerial. Acts performed by this P were directed by sheriff and latter was responsible. The position was one which an infant might legally hold.

Attachment made by D is not void on the ground that he was an infant.

attends the last years of the aged. By the constitution of the United States, no person can be president, who has not attained the age of thirty-five years; nor a senator, who is under the age of thirty years; nor a representative in Congress, until of the age of twenty-five years. And by the constitution of this state, it is provided, that no person shall be capable of being elected a senator, nor be eligible to the office of governor, who is not of the age of thirty years. It is also further declared by the same constitution, that "no person shall hold the office of judge of any court, or judge of probate, or sheriff of any county, after he has attained the age of seventy years."

And some of our statutes deny to persons, of certain ages, the exercise of particular powers and privileges, which are granted to others. Thus, by the statute of June 23, 1815, the right of voting in any public town meeting in any matter, that may come before a town, is given only to persons of the age of twenty-one years. So, by the statute of July 2, 1822, the power of disposing of real estate by will is denied to infants; and it seems, from the language of that statute, that they are incapable of being executors or administrators.

Nor were the imbecility and inexperience of early life disregarded by the common law. For it seems always to have been held, that an infant could not be a juror. Coke Litt. 157, a, — Littleton, sec. 259.

So he could not be an attorney of a court; (Coke Litt. 128, a) nor administrator of an estate; (Lovelass, 5. — Godolphin, 102) nor could he act as executor, until he arrived at the age of seventeen years. Lovelass, 161. — Godolphin, 103.

So it was always held, that an infant could not execute the office of a judge. Croke Eliz. 636, *Scambler v. Waters*. — Coke Litt. 3, b, and note 15. — T. Jones, 127. — 2 Lev. 245.

It has also been decided, that an infant could not hold the office of clerk of a court, where it was part of the duty of the office to receive the money of the suitors. 5 B. & A. 81, *Claridge v. Evelyn*.

But, notwithstanding these disabilities, there are many things, which can be legally done by an infant. He is made, by statute, liable to do duty in the militia at the age of eighteen years.

By the common law, an infant was capable of discharging the duties of an executor at the age of seventeen years. 5 Coke, 29, *Pigot's case*.

It is also well settled, that females of the age of twelve, and males of the age of fourteen years, may dispose of personal property by will. Bingham on Infancy, 77. — 1 Pickering, 239, *Deane v. Littlefield*.

It has long been held, that infants were capable of holding certain ministerial offices. Cro. Car. 555, *Young v. Fowler*. — 2 Roll. Ab. 153. — Com. Dig. "Officer." B. 3. — Cowper, 220, *Rex v. Carter*. — Cro. Car. 279, *Young v. Stoell*.

In England, the office of sheriff was in some counties formerly hereditary, and consequently might have descended to an infant. 1 Bl. Com. 339. — Cro. Car. 556. — 9 Coke, 97.

So an infant may be, it seems, a captain in the army. 8 D. & E. 578, *Hands v. Slaney*. And it was held, that an infant might be an attorney to deliver seisin; because the act was merely ministerial. Co. Litt. 52, a, and note 332.

So it was anciently holden, that an infant might be the keeper of a gaol; and the statute of Westminster 2 (cap. 11), was construed to extend to an infant gaoler, so to charge him in an action of debt for an escape of one in execution. Bingham on Infancy, 73, 108.

Upon a thorough examination of the adjudged cases, which bear upon the question we are now considering, we are satisfied, that the principle, they establish, is, that some offices can, and some cannot, be held by infants. Offices, where judgment, and discretion, and experience are essentially necessary to the proper discharge of the duties they impose, are not to be entrusted in the hands of infants. But they may hold offices, which are merely ministerial, and which require nothing more than skill and diligence.

The plaintiff, in this case, was deputed to serve and return a writ. The service of the writ required an arrest of the body, or an attachment of the goods of the debtor. The return required nothing more than to send the writ to the court, when and where it was returnable, with a true statement upon it of his doings. The service and return seem, therefore, to be acts as merely ministerial, as any that can be conceived.

We are not aware, that the appointment of an infant in this instance could in any way have been detrimental to the public. Had the deputy, by virtue of the writ, arrested the body of a stranger, or taken the goods of a third person, the sheriff might have been compelled to pay all damages, in an action of trespass. 3 Wils. 309, *Saunderson v. Baker*. — 1 Mass. Rep. 530, *Grinnel v. Phillips*. — 17 ditto, 244, *Campbell v. Phelps*. — Doug. 40, *Ackworth v. Kempe*. — 2 W. Black. 832. — Hammond N. P. 82.

Nor was the debtor without ample security for any injury, he might sustain, from the acts or from the negligence of the deputy. Nothing can be more unquestionable, than that the sheriff stands responsible for his deputies in both these respects.

With regard to the deputy himself, there seems to have been nothing in the nature of the duties, he was deputed to perform, which subjected him to hazards, to which an infant ought not to be exposed. There was no greater responsibility in the discharge of those duties, than what is every day thrown upon young men, under age, in the employment of traders and mechanics, and in various other situations.

For these reasons, we are of opinion, that the attachment made by the plaintiff cannot be held to be void on the ground, that he was incapable of holding the office of a special deputy in this instance.

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Guarding's Petition

Correct

FACTS:- Petitioner claims he is unlawfully restrained by jail-keeper. He was committed to jail on a writ issued by a justice of the peace, who was an infant.

DECISION:- Question is whether an infant can exercise the duties of a justice of the peace. This being an office where judgment and discretion are necessary, it cannot be held by an infant. Therefore the petitioner is illegally held and entitled to be discharged from arrest.

GOLDING'S PETITION.

1876. 57 *New Hampshire*, 146.

PETITION for a writ of *habeas corpus*.

Lewis G. Hoyt submitted a written argument in opposition to granting the writ.

[Argument omitted.]

Towle, upon the same side, was heard orally.

Marston and *Wood*, for the petitioner.

SMITH, J. The petitioner, Thomas Golding, complains that he is unlawfully restrained of his personal liberty by Samuel W. Leavitt, keeper of the jail at Exeter, in this county. It appears by the return of the keeper of the jail, that, June 3, 1876, a complaint was presented to Lewis G. Hoyt, a justice of the peace for said county, by James Watkins, charging that the petitioner had threatened to do him bodily harm; that he feared the petitioner would do him some bodily hurt; and praying that he might be ordered to give sureties to keep the peace, &c. A warrant was issued upon said complaint, upon which the petitioner was arrested and brought before William A. Shackford, a justice of the peace for said county, and on June 24, 1876, was ordered to recognize in the sum of \$100, with two sufficient sureties, to be of good behavior for one year, and to pay costs of prosecution taxed at \$8.57, and stand committed till said order should be complied with. Golding having neglected to perform said order, a mittimus was issued by said Shackford, July 17, 1876, by virtue of which he was committed to the jail in Exeter by C. D. Towle, a deputy sheriff, August 2, 1876.

It appears by the evidence introduced, upon the hearing of this petition, that Lewis G. Hoyt, the magistrate before whom said Watkins made his complaint on oath, was born on February 23, 1856, and is therefore still an infant, under the age of twenty-one years. The question presented is, whether an infant can hold the office and exercise the duties of a justice of the peace, or, in other words, whether the proceedings against Golding are invalid because the complaint against him was sworn out before a justice of the peace who was an infant.

In *Moore v. Graves*, 3 N. H. 408, in an opinion by Richardson, C. J., the subject what offices an infant may and what he may not hold was fully considered, and the numerous authorities on the subject collected by him. It is there said, that it has always been held that an infant cannot execute the office of a judge. The authorities cited are *Scambler v. Waters*, Croke Eliz. 636; Coke Litt., 3 b, and note 15; T. Jones, 127; 2 Lev. 245. The learned chief-justice, upon a thorough examination of the adjudged cases, held that "offices where judgment and discretion and experience are essentially necessary to the proper discharge of the duties they impose, are not to be intrusted

in the hands of infants. But they may hold offices which are merely ministerial, and which require nothing more than skill and diligence," — p. 412.

There is no ground for questioning the law as thus stated. The rule is founded in the soundest principles governing the administration of justice, and is for the benefit and safety alike of the public and of the individual — *pro commodo regis et populi*. Coke Litt., 3 b. The grant of such an office "to a man that is unexpert" is merely void. — *Id.* The administration of an oath is a ministerial act, but the office of a justice of the peace is a judicial office, and, being such, cannot be held by an infant.

The defect is one not apparent on the papers, and hence may be shown by extrinsic evidence. It follows that the petitioner was tried upon an illegal complaint. He is therefore entitled to be discharged from arrest.

CUSHING, C. J. The authorities cited by my brother SMITH fully sustain the position that an *infant* cannot hold or execute the office of a justice of the peace, though I think it would hardly be necessary to cite an authority for the doctrine.

Being in the eye of the law *infans*, *i. e.*, speechless, or, in other words, unable to speak for himself in ordinary matters of contract, unable in the eye of the law to exercise sufficient judgment to bind his property by the purchase of a penny-whistle, or by a promissory note for any sum however small, the idea that the same law would permit him to exercise judicial power over the liberty, the persons, and the property of his fellow-citizens, is simply absurd.

I fully agree with my brother SMITH in the conclusions which he has reached.

LADD, J., concurred.

Petitioner discharged from arrest.

TALBOT v. BOWEN.

1819. 1 A. K. Marshall (Kentucky), 436.¹

ON a writ of error to reverse a decree of the Henderson Circuit Court. *Littell*, for plaintiff.

Pope, for defendant in error.

OWSLEY, J. This suit was brought in chancery by Bowen, to obtain a title to a moiety of a lot of ground in the town of Henderson, the equity whereof is asserted by him through a certain William Featherston, who, it is alleged, purchased it from the son and agent of Talbot.

¹ Only so much of the report is given as relates to a single point. — ED.

Talbot v. Bowen

FACTS:- writ of error to reversal decree of circuit court. Suit is brought by Bowen to obtain title to land which he claims thru one Featherstone who purchased it from son and agent of Talbot. D contends that infancy of his son prevents a binding contract of sale.

DECISION:- The Indians' contracts are not always binding on them; when they act as agents, their contracts bind their principal.
Decree reversed.

The purchase of Featherston is admitted by the answer of Talbot, but the authority of his son to sell the land, is denied; and if authorized, it is contended, that owing to his son's infancy, and the inadequacy of the consideration for which the sale was made, a specific execution of the contract ought not to be inferred.

[After discussing other questions.] And that the son was authorized either verbally or in writing to make the sale, from the circumstances detailed in evidence, there is no room for a moment to doubt.

And if authorized, according to the settled doctrine of the law, his being an infant can afford no objection against the liability of Talbot; for although the contracts of infants are not, in all cases, binding upon them, there is no doubt but, as they may act as agents, their contracts, made in that character, if otherwise unexceptionable, will be binding upon their principal.

[Upon another ground, the decree below, in favor of Bowen, was reversed; and the cause was remanded to the court below; a decree to be there entered according to the principles of this opinion.] . . .¹

¹ "The power given" (to the infant) "is a mandate; the moment that mandate is exercised it seems to me that the mandator's intention takes legal effect, not from the exercise of the mandate, but from the gift of the person who delegated the power to exercise his will. . . . It is not a deed really taking effect as the deed of the infant: it is the exercise of the mandate by a peculiarly solemn form, and that is all." BRETT, L. J., *In re D'Angibau*. *Andrews v. Andrews*, 1880, L. R. 15 Chan. Div. 228, pp. 243, 245. But compare JESSEL, M. R., p. 233.

As to the capacity of an infant trustee to sell land devised to him on a discretionary trust for sale, see *King v. Bellord*, 1863, 1 Hemming & Miller, 343.

As to what powers may be exercised by an infant, see above cited case of *In re D'Angibau*. — ED.

CHAPTER II.

CONTRACTS OF INFANTS; AND CONVEYANCES BY OR TO INFANTS. VALIDITY AND EFFECT DURING MINORITY, OR IN THE ABSENCE OF AFFIRMATION AT MAJORITY.¹

HOLT v. WARD CLARENCIEUX.

5 & 6 George 2. 2 Strange, 937.

THE plaintiff declared, that it was mutually agreed between the plaintiff and defendant, that they should marry at a future day, which is past, and that in consideration of each other's promises, each engaged to the other; notwithstanding which the defendant did not marry the plaintiff, but had married another, which she lays to her damage of £4,000.

The defendant with leave of the court pleaded double (*viz.*) *non assumpsit*, and that the plaintiff at the time of the promise was an infant of fifteen years of age.

The plaintiff joins issue on the *non assumpsit*, and a verdict is found for her, with £2,000 damages. And as to the plea of infancy demurred.

This cause was several times argued at the bar, 1. By Mr. *Strange* for the plaintiff, and Serjeant *Chapple* for the defendant. When the court inclined strongly with the plaintiff, because though the defendant would not have the same remedy against her by action for damages, yet they thought he might have some remedy, *viz.* by suit in the ecclesiastical court, to compel a performance, the plaintiff being of the age of consent; and that would be a sufficient consideration. And therefore appointed an argument by civilians, to see what their law would determine in such a case.

Upon the arguments of the civilians, no instance could be shown, wherein they had compelled the performance of a *minor's* contract. And they who argued for the defendant, strongly insisted, that in the case of a contract *per verba de futuro*, (as this was) there was no remedy, even against a person of full age, in the spiritual court, but

¹ For exceptions to the general doctrines, see *post*, Chapter VII.: "Various Classes of Acts, Transfers, and Contracts, where Infant's Liability is sometimes held to be more Extended, or his Right of Disaffirmance more Restricted, than in Ordinary Transactions."

Also see *post*, Chapter VIII.: "Liability for Necessaries." — Ed.

only an admonition. And the only reason why they hold jurisdiction in the case of a contract *per verba de presenti* is, because that is looked upon amongst them to be *ipsum matrimonium*, and they only decree the formality of a solemnization in the face of the church.

After their arguments it was spoke to a fourth time by Mr. *Reeve* and Serjeant *Eyre*. And now this term the Chief Justice [Lord RAYMOND] delivered the resolution of the court.

The objection in this case is, that the plaintiff not being bound equally with the defendant, this is *nudum pactum*, and the defendant cannot be charged in this action. Formerly it was made a doubt by my Lord Vaughan, whether any action could be maintained on mutual promises to marry; but that is now a point not to be disputed. And as to the present case, we should have had no difficulty in giving judgment for the plaintiff, if we could have been satisfied by the arguments of the civilians, that as the plaintiff was of the age of consent, any remedy, though not by way of action for damages, could be had against her. But since they seem to have had no precedent in the case, we must consider it upon the foot of the common law. And upon that the single question is, whether this contract as against the plaintiff, was absolutely void. And we are all of opinion, that this contract is not void, but only voidable at the election of the infant: and as to the person of full age it absolutely binds.

The contract of an infant is considered in law as different from the contracts of all others persons. In some cases his contract shall bind him; such is the contract of an infant for necessaries, and the law allows him to make this contract as necessary for his preservation; and therefore in such case a single bill shall bind him, though a bond with a penalty shall not. 1 Lev. 87.

Where the contract may be for the benefit of the infant, or to his prejudice; the law so far protects him, as to give him an opportunity to consider it when he comes of age: and it is good or voidable at his election. Cro. Car. 502. 2 Roll. 24, 427. Hob. 69. 1 Brownl. 11. 1 Sid. 41. 1 Vent. 21. 1 Mod. 25. Sir W. Jones, 164. But though the infant has this privilege, yet the party with whom he contracts has not: he is bound in all events. And as marriage is now looked upon to be an advantageous contract, and no distinction holds whether the party suing be man or woman, but the true distinction is whether it may be for the benefit of the infant; we think, that though no express case upon a marriage contract can be cited, yet it falls within the general reason of the law with regard to infants' contracts. And no dangerous consequence can follow from this determination, because our opinion protects the infant, even more than if we rule the contract to be absolutely void. And as to persons of full age, it leaves them where the law leaves them, which grants them no such protection against being drawn into inconvenient contracts.

For these reasons we are all of opinion that the plaintiff ought to have her judgment upon the demurrer.

EXTRACTS FROM 1 BISHOP, "MARRIAGE, DIVORCE, AND SEPARATION."
CHAPTER XIX.

§ 561. **Infancy — Majority.** — The status termed infancy ends in majority at the age of twenty-one years in both males and females, except in a few States where girls are by statute made of age at eighteen. But —

§ 562. **Age of Consent.** — The age at which matrimonial consent can be given, — that is, when a minor is capable of marrying, — being the matter to be treated of in this chapter, is a different thing, depending on a different reason. So —

§ 563. **Promise to Marry, Distinguished.** — An infant's promise to marry, whether he is under or over the age of matrimonial consent, is voidable by him, though binding on the other party if an adult. This is a contract, while the marriage permissible at the age of consent is a status; hence the distinction.

[As to the ground of the distinction, see § 566, where the learned author says in substance: Minors in greater or less numbers will come together matrimonially not heeding any admonition from the law, and children will be born of the union. Hence the common law has, in the interest of the public and the unborn children, rendered such marriages valid.]

§ 568. **Fourteen, Twelve — (Age of Consent).** — The common law has fixed the age of puberty, required for marriage, at fourteen in males and twelve in females. It terms this the age of consent. . . .

§ 571. **Seven Years — (Void under).** — Another period to be considered is that of seven years, alike in male and female. If either party to a marriage is below seven it is a mere nullity.

§ 572. **Between Seven, and Fourteen or Twelve — (Inchoate Marriage).** — If both parties have arrived at seven, and either is below his or her age of consent, — that is, under fourteen or twelve, — or, if both are, they may still contract an inchoate or imperfect marriage.

§ 573. **Annuling Inchoate Marriage.** — They cannot avoid or annul this marriage until the one discarding it has reached the age of consent for such party, whether it be twelve or fourteen; and perhaps not until the other has also arrived at his or her age of consent.

§ 575. **Both Bound or Neither — (More of when Dissent).** — Since there cannot be a husband without a wife or a wife without a husband, both parties must be bound by this marriage or neither. So that though one has passed the age of consent, if the other has not, either may avoid the marriage when the latter has arrived at such age; as, if a boy of fourteen marries a girl of ten, he, at her age of twelve, as well as she, may disaffirm the marriage. This rule, differing from that in the ordinary contracts of infants, comes from the special nature of matrimony; wherein either both parties must be bound, or an equal election of disagreement be open to both. It is so also, to some degree if not fully, in other parts of the marriage law.

§ 586. **The Doctrine of this Chapter Restated.** — . . . The complete mental capacity, which the age of twenty-one is recognized as bringing, is not required in the executed contract of marriage, but it is in the executory. At the first impression this distinction would seem to be in abnegation of common reason; because an injudicious promise to marry is less harmful to the one making it than an unfortunate marriage. But this sort of reasoning leaves out of view the grave public and collateral private interests involved in matrimony. No special public harm is done when a minor promises marriage, then breaks

his promise and pleads his nonage. But it would be a public scandal, an enormous abscess on the body politic, and a private curse to permit minors to come together in actual matrimony, then leave each other because of their nonage, then pair off differently, and continue the process until they were twenty-one years old. Hence the somewhat technical rules of the common law, fixing different ages for different steps in matrimony, — rules in some degree modified in a part of the States by statutes. . . .

FLIGHT v. BOLLAND.

1828. 4 *Russell*, 298.

THE bill was filed by the plaintiff, as an adult, for the specific performance of a contract. After the suit was ready for hearing, the defendant, discovering that the plaintiff was, at the time of the filing of the bill, and still continued, an infant, moved the court, that the bill might be dismissed with costs to be paid by the plaintiff's solicitor. Upon that occasion the Vice-Chancellor made an order, that the plaintiff should be at liberty to amend his bill, by inserting a next friend for the plaintiff; and the bill was amended accordingly.

Upon the opening of the case, a preliminary objection was taken, that a bill on the part of an infant for the specific performance of a contract made by him could not be sustained.

Mr. *Bickersteth* and Mr. *Koe*, in support of the objection.

There is no instance of a decree for specific performance at the suit of an infant, and it would be contrary to the principles of a court of equity to entertain such a suit. Courts of equity, acting merely on equitable principle, will not lend their aid, where the remedy is not mutual; want of mutuality has always been deemed a sufficient ground for refusing specific performance of a contract. *Howell v. George*, 1 Mad. 1, *Lawrenson v. Butler*, 1 Sch. & Lef. 13. It is clear that specific performance could not be decreed against an infant, Co. Lit. 2 b; and, therefore, it will not be decreed at the suit of an infant. Even if a decree were made according to the prayer of the bill, it would be impossible for the court to compel the plaintiff to execute that decree. He could not be forced to pay the purchase-money; and, on attaining his full age, he might repudiate the contract and the suit. At law, an infant may maintain an action for breach of a contract, *Warwick v. Bruce*, 2 M. & S. 205; but he has no remedy in equity.

Mr. *Pepys*, Mr. *Morley*, and Mr. *Stuart*, for the plaintiff.

[Argument omitted.]

THE MASTER OF THE ROLLS. [Sir JOHN LEACH.] No case of a bill filed by an infant for the specific performance of a contract made by him has been found in the books. It is not disputed, that it is a general principle of courts of equity to interpose only where the remedy

is mutual. The plaintiff's counsel principally rely upon a supposed analogy afforded by cases under the statute of frauds, where the plaintiff may obtain a decree for specific performance of a contract signed by the defendant, although not signed by the plaintiff. It must be admitted that such now is the settled rule of the court, although seriously questioned by Lord Redesdale upon the ground of want of mutuality. But these cases are supported, first, because the statute of frauds only requires the agreement to be signed by the party to be charged; and next, it is said that the plaintiff, by the act of filing the bill, has made the remedy mutual. Neither of these reasons apply to the case of an infant. The act of filing the bill by his next friend cannot bind him; and my opinion therefore is, that the bill must be dismissed with costs, to be paid by the next friend.

YEAGER v. KNIGHT.

1883. 60 *Mississippi*, 730.¹

CHALMERS, J. This is an action to recover damages arising from a refusal to carry out a parol contract for the sale of land, and is evidently based upon the cases of *Lawson v. Welch*, 32 Miss. 170, and *Cain v. Kelly*, 57 Miss. 830. To the declaration the defendant (the parol vendor of the land) pleaded that he was an infant when said parol agreement was entered into, and to this plea the court sustained a demurrer. This action of the court was erroneous. There are numerous cases holding that actions of tort may be maintained against infants, though the wrongs complained of were connected with and grew out of contracts. There are many also which deny that such suits can be maintained. The authorities on either side are partially collected and commented on in *Ferguson v. Bobo*, 54 Miss. 121.

It is manifest, however, that no action will lie simply by reason of the refusal of an infant to carry out an executory contract, nor because of his disaffirmance, after majority, of his executed contracts. This is always his legal right, of which all who deal with him are bound to take notice, and no charge of fraud or bad faith can be imputed to him on account of it. *Brantley v. Wolf*, ante, p. 420. In the present case the infant vendor would have had a perfect right to refuse to execute a deed, even though he had signed a bond obligating himself so to do, and certainly his rights are not less under a parol contract. The plea should have been replied to.

If plaintiff can aver and prove that he was induced to believe that defendant was of age when the contract was entered into, by the positive affirmation of defendant to that effect, and that defendant sought

¹ Arguments omitted. — ED.

at the time to entrap him into a contract which he then secretly intended to repudiate, to his own profit and to plaintiff's loss, the case would seem to fall within that class of cases which hold infants liable for their frauds, even though they originate in contracts. Whether we would in an action at law follow the cases which affirm, or those which deny, this doctrine, we will not decide until the case comes properly before us. We have already given our views on the subject, as to suits in chancery. *Ferguson v. Bobo, supra; Brantley v. Wolf, supra.*
Reversed and remanded.

WEST v. GREGG'S ADMINISTRATOR.

1854. 1 *Grant's Cases (Pa.)*, 53.¹

LOWRIE, J. This is an action against a minor for money lent to him, and to meet the defence of infancy, it was offered to prove that the money was lent to him for the purpose of making repairs and removing encumbrances upon land devised to him by his father, and that it was so used.

The court below rejected the evidence on the ground that the infant had no power to make such a contract, and we think they were right. The general rule is that an infant can bind himself or his estate only for necessities, and the plaintiff can escape from this rule only by showing a case which ought to be treated as an exception to it; which he has not done. Necessity has certainly demanded many exceptions to this rule, but here it demands none; for this minor had a guardian acting for him, and the law has provided the very mode in which the end might have been reached. Orphans' Court Act, 1832, sec. 31.

If we were to apply in a general way, the rule that, in some special cases, requires an infant to refund the consideration if he avoids the contract, we shall convert the exception into the rule, and place the rule among its exceptions. Here he would have to pay the debt in order to get leave to plead infancy.

The rule that sometimes binds an infant when the contract is beneficial to him, is of the same character. It is a means of testing the validity of certain necessary exceptions. It is not itself a general rule, but a means of limiting certain exceptional rules, and preventing them from injuring the minor. It is never applied to cases of money lent.

Judgment affirmed

¹ Statement and argument omitted. — ED.

MERRIAM v. CUNNINGHAM.

1853. 11 *Cushing (Mass.)*, 40.¹

ASSUMPSIT for the keep of four horses from May to October, 1850, at \$14 per week. The principal defence was infancy.

Reportive { The plaintiff offered evidence tending to show that the defendant fraudulently represented himself to the plaintiff as being of full age, and thereby obtained the credit aforesaid, and he claimed that the defendant was thereby estopped to set up the defence of infancy. But the judge ruled that such a representation on the part of the defendant would be no reply to the defence of infancy, and excluded the evidence.

Verdict for defendant.

BIGELOW, J. The plaintiff seeks to avoid the defendant's plea of infancy in the present case by proof, that the defendant fraudulently represented himself to be of full age, and thereby obtained credit for the keep of the horses, to recover the price of which this action of assumpsit is brought. But it appears to us, that no such answer to a plea of infancy can be allowed, without overturning the well established rules of law applicable to the contracts of minors. The plaintiff seeks to recover upon a contract which, upon plea and proof, is legally avoided. The fraud of the defendant, if ever so clearly shown, does not restore validity to his promise, or, in any way, enhance its obligation; it is the contract, which forms the sole right of the plaintiff to recover in this suit, and no liability upon it, as such, can be maintained against the defendant, who has established its legal invalidity. If the position assumed by the plaintiff is sound, then the result would be that a plaintiff in an action of assumpsit on a contract, which the law holds void, would recover damages for an injury caused by the fraudulent misrepresentations of the defendant. It is manifest that no such confusion of rights and remedies can exist in the law. Besides; in an action of assumpsit, the measure of damages is the amount which the defendant promised to pay by his contract; but for fraudulent representations the plaintiff could recover only the damages actually sustained; which might, and often would be much less than the amount due on the contract, for the very reason, that the infant may have been overreached, and promised to pay more than an equivalent for that which he received by the contract. The doctrine contended for by the plaintiff would effectually deprive infants of that protection which the law sedulously seeks to afford them in their dealings.

It is by no means clear, that an action *ex delicto* can be maintained against an infant for fraudulently representing himself to be of age, and

¹ Only so much of the report is given as relates to a single point. — ED.

by means of such representation and deceit, procuring credit on a contract, which he subsequently avoids by a plea of infancy. The cases are not uniform on this question. The earlier authorities are clear to this point that no such action can be maintained. *Johnson v. Pie*, 1 Lev. 169; and 1 Keb. 905; *Grove v. Nevill*, 1 Keb. 778, 914; *Green v. Greenbank*, 2 Marsh. 485. It has been argued in regard to cases of this kind, that the representation itself is not actionable, because it is no injury. It is the avoidance of the contract which causes damage and creates the injury, and that was merely the exercise of a legal right by the infant for which no action will lie; that no such action can be maintained without making the contract an essential part of the right of recovery, which being void, leaves nothing upon which the infant can be legally charged. 20 Amer. Jur. 265; 1 Amer. Lead. Cas. 118; Bing. on Inf. (2d Amer. ed.) 113, note. But without expressing an opinion on this point, it is entirely clear that such false representations are no sufficient answer to a plea of infancy in an action on a contract. Even in New Hampshire, — where it is held that an infant is liable to an action *ex delicto* for fraudulent representations as to his age in procuring a contract, which he subsequently avoids by a plea of infancy, *Fitts v. Hall*, 9 N. H. 441, — it has been decided that such representations cannot be set up as an answer to a plea of infancy in an action on a contract. *Burley v. Russell*, 10 N. H. 184. See *West v. Moore*, 14 Verm. 447; *People v. Kendall*, 25 Wend. 399. The only case cited by the plaintiff in support of his position, *Bristow v. Eastman*, 1 Esp. 172, does not sustain the doctrine for which he contends. That was an action in form *ex contractu* against an infant for a tort in embezzling money, and it was intimated by the court that the act being one for which an infant was in law liable, and to an action for which infancy was no defence, the form of the remedy might be the same as against an adult, and therefore that the plaintiff might waive the tort, and sue in assumpsit. The authority of this case has been questioned, 20 Amer. Jur. 267; and whether sound or not, furnishes no analogy to the case at bar.

[Remainder of opinion omitted.]

EX PARTE UNITY JOINT-STOCK MUTUAL BANKING ASSOCIATION.

IN THE MATTER OF OCTAVIUS KING, A BANKRUPT.

EX PARTE IN THE SAME MATTER.

1858. 3 *De Gex & Jones*, 63.¹

APPLICATION to a Commissioner to allow a claim against the separate estate of Octavius King, a bankrupt. Octavius King, while an infant, obtained a loan of the Unity, &c. Association and gave a bond for the amount. At the time of executing the bond and borrowing the money, he represented himself to the Association as of full age. Upon a second application, proof for the loan was admitted. An appeal was taken by the assignees, and also by a creditor.

Swanston, Selwyn, and Hannen, in support of the appeals.

Bacon and Cooper for the Association.

KNIGHT BRUCE, L. J. It is unnecessary to say what in this case we might have thought it fit to do if we had been exercising a jurisdiction merely legal, for our jurisdiction is equitable as well as legal. Again, with respect to our equitable jurisdiction, it is not material to say what we might have thought the proper course to be taken in the absence of decision; for I think that, upon the admitted facts, the case is concluded by the judicial opinions of Lord Cowper, Lord Hardwicke, Lord Thurlow, and other eminent judges, which it would be improper in us practically to question. A young man, who from his appearance might well have been taken to be more than twenty-one years of age, engaged in trade, and wished to borrow or to obtain credit, and for the purpose of so doing represented himself to the petitioning creditor as of the age of twenty-two, expressly and distinctly so represented himself. We feel no difficulty or doubt on the question, whether the minor did at the time believe or not believe what he said, for it is impossible from the materials before us to infer that he did believe his statement to be true or was ignorant of his own age when he obtained the money. The question is, whether in the view of a Court of Equity, according to the sense of decisions not now to be disputed, he has made himself liable to pay the debt, whatever his liability or non-liability at law. In my opinion we are compelled to say that he has.

TURNER, L. J. I have the strongest inclination to expunge this proof; but the authorities are too strong to permit us to do so. If the course which has been taken by Courts of Equity on this subject is to be altered, it must be so by the House of Lords and not by us.

¹ Statement abridged. Arguments omitted. — ED.

HALL v. BUTTERFIELD.

1879. 59 *New Hampshire*, 354.

ASSUMPSIT, to recover for goods sold and delivered. The defendant pleaded infancy, and the question was reserved whether that was a bar to the plaintiffs' recovery. The defendant was engaged in trade, and the goods were purchased by him for the purposes of trade, and were not necessities within the ordinary meaning of that term.

Albin & Streeter and *Rand*, for the plaintiffs.

Mugridge, for the defendant, contended that the contract was voidable at the election of the defendant, and that nothing was necessary to be done by him as a prerequisite to avoidance, — citing and commenting on *Heath v. West*, 28 N. H. 101; *Fitts v. Hall*, 9 N. H. 446; *Badger v. Phinney*, 15 Mass. 362; *Carr v. Clough*, 26 N. H. 294.

STANLEY, J. The defendant interposes the plea of infancy as a bar to the plaintiffs' right to recover, and, so far as this right depends on an *express contract*, it is a complete answer. The express contract, on which the plaintiffs' rely, was voidable at the defendant's election, but it does not necessarily follow, because the defendant exercises his privilege to avoid the contract, that he is under no liability to the plaintiffs.

The right of infants, lunatics, persons *non compos mentis*, and drunkards, when in such a state as to be entirely deprived of reason, to avoid their contracts, is placed on the same ground. They are considered to be devoid of that freedom of will, combined with maturity of reason and judgment, essential to enable them to give the assent necessary to make a valid contract. To protect them from fraud and imposition, to which from their want of understanding and immaturity of judgment they are exposed, they are permitted to allege their want of capacity to bind themselves by contract. But this privilege is to be used as a shield, not as a sword; not to do injustice, but to prevent it. *Zouch v. Parsons*, 3 Burr. 1794; *Seaver v. Phelps*, 11 Pick. 304; *Allis v. Billings*, 6 Met. 415; *Hallett v. Oakes*, 1 Cush. 296; *Taft v. Pike*, 14 Vt. 405; *Lincoln v. Buckmaster*, 32 Vt. 652; *Matter of Barker*, 2 Johns Ch. 233; *Sanford v. Sanford*, 62 N. Y. 553, 557; *Squier v. Hydliff*, 9 Mich. 274; *Spicer v. Earl*, 41 Mich. 191; *Allen v. Berryhill*, 27 Iowa, 540; Benj. Sales, s. 21; 1 Pars. Cont. 293; Chit. Con. 135, 136, 141; 1 Fonbl., B. 1, c. 2, s. 4; Bing. Inf. 63; Ewell L. C. 588.

But while the disabilities of these different classes of persons and the reasons on which they are placed are the same, and they equally require protection, the application of the principles of law governing their rights and liabilities and their status has been widely different, and has undergone marked changes from time to time. Under the ancient common law, lunatics were allowed to show their lunacy in defence of

their alleged contracts (2 Bl. Com. 291); but later, in the times of Edward III, "a scruple began to arise whether a man should be permitted to blemish himself by pleading his own insanity. Under Henry VI this way of reasoning . . . was seriously adopted by the judges, . . . and from these loose authorities, which Fitzherbert does not scruple to reject as being contrary to reason, the maxim that a man shall not stultify himself hath been handed down as settled law." 2 Bl. Com. 291, 292; Bac. Abr., Idiots & Lunatics, F. The reason assigned for this maxim was, that a man cannot know in his sanity what he did when he was insane (*Stroud v. Marshall*, Cro. Eliz. 398; *Cross v. Andrews*, Cro. Eliz. 622); or, as stated by Littleton, "no man of full age shall be received in any plea by the law to disable his own person." Co. Litt., B. 3, 247 *b*. That such a doctrine ever could have been held to be law seems incredible, for, to use the language of Wilmot, J., it does seem to be very unaccountable that a man should be at liberty to avoid his own acts caused by the duress of man, and not those caused by the duress of Heaven. Wilm. Op. 155; 5 Bac. Abr. (Bouv. ed.) 26. "How so absurd and mischievous a maxim could have found its way into any system of jurisprudence, professing to act upon civilized beings, is a matter of wonder and humiliation. There have been many struggles against it by eminent lawyers in all ages of the common law; but it is, perhaps, somewhat difficult to resist the authorities which assert its establishment in the fundamentals of the common law — a circumstance which may well abate the boast, so often and so rashly made, that the common law is the perfection of human reason." Story Eq., s. 225. But this doctrine has been exploded as manifestly against natural justice (2 Kent Com. 451), and it has been finally considered, in this and other jurisdictions, that lunatics and persons *non compos mentis* may show their incapacity as a defence to their contracts. Indeed, this doctrine seems now well established in this country. *Lang v. Whidden*, 2 N. H. 435; *Burke v. Allen*, 29 N. H. 106; *Mitchell v. Kingman*, 5 Pick. 431; *Rice v. Peet*, 15 Johns. 503; 5 Bac. Abr. (Bouv. ed.) 26; 2 Kent Com. 451, 452, and notes and authorities *passim*.

Again: it was formerly held that the contracts of lunatics and persons *non compos mentis* were absolutely void (*Thompson v. Leach*, 3 Mod. 301; *Gore v. Gibson*, 13 Mee. & W. 623; Chit. Con. 24, 139); but this has been seriously questioned, and it is now held that they are voidable only (*Wait v. Maxwell*, 5 Pick. 217; *Allis v. Billings*, 6 Met. 415 — S. C., 2 Cush. 19; *Ingraham v. Baldwin*, 9 N. Y. 45; Met. Con. 80; Pars. N. & B. 151; 2 Hill, R. P. 408, s. 16); and that where a contract is entered into in good faith with a lunatic or a person *non compos mentis*, and is for the benefit of such person, courts of law, as well as equity, will uphold it. *McCrillis v. Bartlett*, 8 N. H. 569; *Young v. Stevens*, 48 N. H. 133; *Mut. Life Ins. Co. v. Hunt*, 79 N. Y. 541; *Hallett v. Oakes*, 1 Cush. 296; *Molton v. Camroux*, 2 Welsby H. & G. 487 — S. C., 4 Welsby H. & G. 17; *Elliot v. Ince*, 7

De G. M. & G. 475; *Baxter v. Earl of Portsmouth*, 5 Barn. & C. 170; *Niell v. Morley*, 9 Ves., Jr., 478; *Brown v. Jodrell*, 3 Car. & P. 30; *Gore v. Gibson*, *supra*; 1 Pars. Con. 386; Benj. Sales, s. 29; Story Eq., s. 228. Greenleaf states the doctrine thus: Where goods have been supplied to a party which were necessities, or were suitable to his or her station or employment in life, and which were furnished under circumstances evincing that no advantage of his or her mental infirmity was attempted to be taken, and which have been enjoyed by such party, then he or she is liable at law, as well as in equity, for the value of the goods. 2 Gr. Ev., s. 369; *Kendall v. May*, 10 Allen, 62.

From this brief review, it is seen that there has been a change in the law relating to the rights and liabilities of lunatics and persons *non compos mentis*, from absolute liability upon all contracts to no liability upon any contract, and from that to a liability limited by the benefit received. This latter doctrine places their rights and liabilities upon broader, more rational and just grounds than they have ever been before, for it regards the rights of both parties, — treats both parties to the contract as equally under the protection of the law, — the lunatic and the person *non compos mentis*, by allowing them to rescind their contracts, accounting for the benefit received from it; the other party, by allowing him to recover to the extent of the benefit received by the lunatic.

The privilege accorded to infants to avoid their contracts rests on the same ground as that accorded to lunatics and persons *non compos mentis*, — protection against fraud to which by reason of their immaturity of judgment they are liable. So far as relates to their contracts, these different classes of persons are said to be parallel, both in law and reason. *Seaver v. Phelps*, 11 Pick. 304; *Breckenridge's Heirs v. Ormsby*, 1 J. J. Marsh. 236; *Thompson v. Leach*, 3 Mod. 301; 1 Pars. Con. 293; Story Eq., ss. 223, 224, 242, and authorities *passim*. But the principles applicable to their contracts have not been the same, and even with regard to the contracts of infants the law has been materially changed. Until the decision in *Zouch v. Parsons*, 3 Burr. 1794, none of the contracts of minors were enforceable. They were all either void or voidable. Bac. Abr., Infant I, 3; Com. Dig., Infant B. 5; *Lloyde v. Gregory*, Cro. Car. 502. But in *Zouch v. Parsons*, *supra*, it was held that infants were liable on their contracts for necessities on the ground of necessity, and because they were of benefit to the infant. Lord Mansfield said, page 1801, "Great inconveniences must arise to others if infants were bound by no act. The law, therefore, at the same time that it protects their imbecility and indiscretion from injury through their own imprudence, enables them to do binding acts for their benefit. . . . A third rule, deducible from the nature of the privilege that is given as a shield and not as a sword, is, that it never shall be turned into an offensive weapon of fraud or injustice. . . . The end of the privilege is to protect infants. To that object, therefore, all the rules and their exceptions must be directed." In *Drury*

v. *Drury*, cited in *Maddon v. White*, 2 T. R. 159, Lord Mansfield laid it down as a general principle, that if an agreement be for the benefit of an infant at the time, it shall bind him; and Buller, J., said Lord Hardwicke afterward adopted this rule. But this broad principle announced by Lord Mansfield, and which seems so just and wise, and which secures to infants all the protection necessary to save them from the consequences of immaturity of judgment and understanding, has been limited so that under it they have only been held liable, upon an implied contract, for necessities, such as necessary meat, drink, apparel, medicine, and instruction, and, if married, provision for wife and children. Bing. Inf. 87. Recently the term has been extended to include counsel fees, in cases involving their liberty. *Barker v. Hibbard*, 54 N. H. 539; *McCrillis v. Bartlett*, 8 N. H. 569. Formerly it was held by some authorities that they could not be allowed to rescind their contracts in regard to either personal or real property until after coming of age; but this has been modified, so that, as to their contracts in regard to personal property, they may rescind as well before as after. *Carr v. Clough*, 26 N. H. 289, 291; *Roof v. Stafford*, 7 Cow. 179; *Stafford v. Roof*, 9 Cow. 626; *Zouch v. Parsons*, *supra*. So they were formerly allowed to rescind, and recover what they had paid on their contracts without restoring what they had received. But this has been changed, and it is now held that they cannot rescind without restoring or offering to restore the consideration, if remaining *in specie*, and in the possession or control of the infant and capable of return; and in some jurisdictions it is now held, that where the consideration cannot be restored, the infant, before he can be allowed to rescind, must place the adult in as good condition as though he had returned the consideration, or he must account for the value of it. *Carr v. Clough*, *supra*; *Heath v. West*, 28 N. H. 101, 110; *Locke v. Smith*, 41 N. H. 346, 353; *Young v. Stevens*, 48 N. H. 133, 137; *Heath v. Stevens*, 48 N. H. 251; *Kimball v. Bruce*, 58 N. H. 327; *Price v. Furman*, 27 Vt. 268; *Badger v. Phinney*, 15 Mass. 359; *Riley v. Mallory*, 33 Conn. 201, 207; Ewell L. C. 123, 125; 2 Kent Com. 236, 240; Benj. Sales, s. 27 note. This is especially the case in contracts for services, where the infant seeks to avoid his contract and recover what his services are reasonably worth; and this allows the adult to set off against the value of the plaintiff's services the reasonable value of what the infant has received on account of such services; or, in other words, the infant is entitled to recover for the benefit which the adult has derived from the services performed by him. *Lufkin v. Mayall*, 25 N. H. 82; *Locke v. Smith*, *supra*; *McCrillis v. How*, 3 N. H. 348; *Vent v. Osgood*, 19 Pick. 572; *Stone v. Dennison*, 13 Pick. 1; *Breed v. Judd*, 1 Gray, 455; *Gaffney v. Hayden*, 110 Mass. 137; *Hoxie v. Lincoln*, 25 Vt. 206; *Harney v. Owen*, 4 Blackf. 337; *Squier v. Hydliff*, 9 Mich. 274; *Spicer v. Earl*, 41 Mich. 191; *Whitmarsh v. Hall*, 3 Den. 375; *Makarell v. Bachelor*, Cro. Eliz. 583; *Ive v. Chester*, Cro. Jac. 560; Ewell L. C. 109.

Again: as has been shown, infants were formerly held liable on their contracts for necessities; but it is now held that they are liable, not by virtue of any contract, but on the ground of an implied legal liability based on the necessity of the situation. Bing. Inf., Bennett's notes, 87.

It is apparent that the tendency of the later decisions is to enlarge the liabilities and obligations of infants; and, while the liability has not in their case been extended so far as it has in regard to lunatics and persons *non compos mentis*, the principle on which it rests is the same. The grants of infants and persons *non compos* are parallel, both in law and reason. *Thompson v. Leach*, 3 Mod. 301; *Seaver v. Phelps*, 11 Pick. 304; *Breckenridge's Heirs v. Ormsby*, *supra*. In view of these facts, no reason appears why the wise and just principle enunciated by Lord Mansfield should not be given its full force, and the rights and obligations of lunatics, persons *non compos mentis*, drunkards when in such a state as to be entirely bereft of reason, and infants be placed on the same ground. The obligation to account only for the benefit actually received secures ample protection from fraud and imposition, and at the same time prevents the privilege from being used to perpetrate fraud. It prevents their disability from being "not their protection merely, but an extraordinary legal ability to rob others; not a shield, but a sword; not a mere legal incapacity to be plundered by their fellow-men, but a vast capacity to plunder them with impunity."

The right to recover for necessities is given, because the infant has derived a benefit therefrom. It is upon no other ground. If the benefit is the foundation of the right, why should it be limited to necessities? It cannot be said that the infant, if engaged in trade or business, may not derive a benefit therefrom. If benefit obtained by the infant is the test in one case, why not make it the test in all cases? This has been made the test in the case of lunatics and persons *non compos mentis*, and it should be applied in the case of infants. The true rule is, that the contract of an infant or lunatic, whether executed or executory, cannot be rescinded or avoided without restoring to the other party the consideration received, or allowing him to recover compensation for all the benefit conferred upon the party seeking to avoid the contract. The question whether the infant has received a benefit,—like the question of what are necessities, and what sum the infant ought to pay for them, or the question of negligence or ordinary care, and other similar questions,—is one of mixed law and fact. No uniform rule can be established. A contract, which under some circumstances to one person might be beneficial, under others and to another might be injurious. In no two cases are we likely to find the same facts; and it must always be for the trier to apply the law to the facts, and determine whether the infant has been benefited, and to what extent. Bing. Inf., Bennett's notes, 88.

Our conclusion is, that the plea of infancy is not a bar to the plain-

tiffs' recovery, but that they may recover to the extent of the benefit received by the defendant, not exceeding the price he agreed to pay for the goods.

Case discharged.

BINGHAM, J., did not sit: the others concurred.

JAMES SMITH v. GEORGE SMITH.

1836. 7 *Carrington and Payne*, 401.

SITTINGS at Guildhall in Hilary Term, 1836. Before Mr. Justice VAUGHAN.

Trover for a watch, chain and seals. Pleas — *first*; Not guilty; and *secondly*, that at the time of the alleged conversion the plaintiff had not any property in the things mentioned in the declaration.

It appeared that the plaintiff and defendant were brothers, and that their father (who was dead, and to whose estate the defendant had taken out administration), had, in his lifetime, employed a person named Conway to purchase the watch in question at a sale, and afterwards, in the presence of Conway, gave it to the plaintiff, then a youth about seventeen years of age, saying at the time, "James, you shall have this watch, and I hope you will be steadier." The plaintiff took the watch, thanked his father for it, and continued to wear it for some time.

The defence was, that the father had never given the watch to the plaintiff absolutely; but, even supposing that he had, yet that he had taken it back again, and afterwards given it to the defendant. The defendant also claimed to keep the watch in his representative character as administrator.

Bompas, Serjt., and *Stammers*, for plaintiff.

Byles, for defendant.

— VAUGHAN, J. (in summing up), told the jury, that if the father had made an absolute, solemn, and irrevocable gift of the watch to his son the plaintiff, and the plaintiff had accepted it, the law would not allow the father, without the consent of his son, afterwards to reclaim the gift.

Verdict for the defendant.

[A new trial was subsequently granted on account of an erroneous ruling, rejecting certain evidence offered by the plaintiff.]

FACTS:- Trover for a watch. P and D were brothers. P's father gave him the watch, but afterwards took it back and gave it to D. D, as his father's administrator, claims the watch.

DECISION:- If P's father made an absolute gift to P, and latter accepted it, the law does not allow it to be taken back without P's consent.
Verdict for Defendant.

Scot and wife v. Haughton and Dr. Fuller

FACTS:- Mrs. Fuller, wife of Dr. Fuller, distributed lottery tickets among her servants with the condition that if more than 20s. should come up, her daughter should have a moiety. Haughton, a minor, won the £2000 lot, and the daughter now sues for her part.

DECISION:- An infant will be bound by a condition such as this and may be a trustee.
Judgment for Plaintiff

Zouch v. Parsons

FACTS:- John Bicknell conveyed, by way of mortgage, certain lands to Wm. Cooke, who afterwards died, leaving his widow and his eldest son, an infant, as joint executors.

The mortgagors brot title deeds of the land to an attorney as security for a sum to pay the mortgage. The attorney applied to P's lessors who agreed to advance the money. Cooke's widow and his son, then an infant, conveyed by lease and release, and Bicknell ratified and confirmed, the premises to P's lessors, in consideration of a sum of money.

Bicknell, continuing in possession of the premises, later conveyed them, by way of mortgage, for a term of years, to one who assigned the term to D, for a good consideration. D had notice of the mortgage made to Cooke, and its assignment to P's lessors.

Cook's son made an entry on the premises to avoid his lease and release to P's lessors.

Question is whether P's lessors are entitled to recover the premises.

DECISION:- The infant received the land only as a pledge for the rest of the money due on the mortgage. Upon payment of that he was bound to convey the land; he was in position of trustee to Ps. Therefore he was compellable to make the conveyance, as he had done, and consequently it was binding upon him.

Gifts, grants or deeds made by infants are voidable if they take effect by delivery; if not effected by delivery they are void. The deed in question was voidable only.

The infant cannot elect to confirm the conveyance, and D can have no estate under it.

Re-entry did not avoid conveyance.
Judgment for Plaintiffs

SCOT ET UX. v. HAUGHTON AND DR. FULLER.

1706. 2 *Vernon* (*Chancery*), 560.

ONE Mr. Cornewallis having set up a lottery called the Wheel of Fortune, or a thousand pounds for a penny; Mrs. Fuller the wife of Dr. Fuller, sent for twenty-four of those tickets, and gave them amongst the servants, upon condition if 20s. or more should come up, her daughter should have a moiety of the lot; and one of them thus given to the defendant Haughton, her foot-boy, happened to produce the £1000 lot.

The £1000 being paid to Dr. Fuller, Scot and his wife, daughter of Mrs. Fuller, brought their bill for a moiety of the £1000 lot. And it being undeniably proved by the rest of the servants and others, that the ticket, which cost but one penny, was given the foot-boy on that condition. *He who has a right, has a right of disposition*

Per Cur. Cujus est dare, ejus est disponere, and an infant is to be bound by it as well as one of full age, and may be a trustee; and decreed it for the plaintiff accordingly.¹

ZOUCH, *ex dimiss*, ABBOT AND HALLET v. PARSONS.

1765. 3 *Burrows*, 1794.²

THIS was a special case in ejectment: and the question was “Whether an INFANT’S conveyance *by lease and release* was *absolutely* VOID, or only VOIDABLE.”

This cause had been twice tried. Upon the first trial, an incomplete case had been drawn up and agreed upon; which having been argued on *Friday* 17th, *June* 1763, by Mr. Serjeant *Glynn* for the plaintiff, and Mr. *Dunning* for the defendant, LORD MANSFIELD then observed, that many circumstances were necessary to be known, besides those contained in the case as it then stood; which was not sufficiently stated, to come at the merits: and if the parties could not agree upon the facts, the cause must be tried over again, and those facts ascertained. It was therefore adjourned at that time, in order for the necessary facts and circumstances to be more completely stated: and, the parties not agreeing to them, a second trial became requisite.

It was tried this second time, at the Lent Assizes, 1764, for *Somersetshire*, before Mr. Justice *Yates*; when a verdict was found for the plaintiff, subject to the opinion of this court, upon the following case.

¹ Reg. Lib. 1705. B. fol. 261. Note, the tickets were purchased by Mrs. Fuller out of her own separate fortune.

² Arguments omitted. — ED.

Special case. *John Bicknell*, being seised in fee of the messuage and lands in the declaration mentioned, by indenture of lease and release dated 24th *March* 1750, and 25th *March* 1751, conveyed the premises to *William Cook* and his heirs, by way of mortgage, for securing the repayment of £280. *William Cook* afterwards died, leaving *John Lamb Cook*, AN INFANT, his eldest son and heir at law; and also leaving his widow *Elizabeth Cook* and the said *John Lamb Cook* his joint-executors and residuary legatees.

John Bicknell, the mortgagor, afterwards brought the title-deeds of the premises to one Mr. *John Williams* an attorney, and desired him to procure the sum of £400 upon the same security; in order to pay off the said mortgage to the *Cooks*, and for other purposes. *Williams* applied to the lessors of the plaintiff, who agreed to advance the same; and by indentures of lease and release bearing date respectively on the 29th and 30th of *June* 1761, between the said *John Lamb Cook* (then being an infant of between 16 and 17 years of age) and the said *Elizabeth Cook*, of the 1st part; the said *John Bicknell* of the 2nd part; and the said *Henry Abbott* and *Catharine Hallett*, (lessors of the plaintiff) of the 3d part; the said *John Lamb Cook* and *Elizabeth Cook*, in consideration of the sum of £280 in the said release mentioned to be to them paid by the lessors of the plaintiff, granted and released, and the said *John Bicknell*, as well for the consideration aforesaid, as for the further sum of £120 to him mentioned to be paid by the said lessors of the plaintiff, granted, ratified and confirmed the said premises to the said *Abbott* and *Hallett*, and their heirs, to hold to them, their heirs and assigns for ever.

The said Mr. *Williams* when he drew the last mentioned mortgage-deed, apprehended that the whole principal sum of £280 continued due to the representatives of the said *William Cook*, upon his said mortgage; and therefore expressed that sum to be the consideration paid to them: but, in fact, the sum of £100 only principal money, and £9 for interest, then remained due thereon; the said *William Cook* having been paid the other £180 in his lifetime; and accordingly, at the time of the execution of the said last mentioned indentures of lease and release, *Elizabeth Cook* received £109 being the principal and interest then remaining due to her son and her as representatives of her late husband, upon his mortgage; and the residue of the sum of £400 was received by the said *John Bicknell*, from the lessors of the plaintiff.

The said *John Bicknell* continuing in possession of the premises from the time of his conveyance thereof to the said *William Cook*, until the year 1756; when he conveyed the premises, by way of mortgage for £200 to one *Thomas Thorne*, for a term of years, who in *March* 1762 assigned the said term to the defendant *Henry Parsons*, in consideration of the sum of £228 in the said deed of assignment mentioned to be the principal, interest and costs then due from *Bicknell* to the said *Thorne*: but before the assignment to the defendant, Mr. *Williams*, then being attorney for the lessors of the plaintiff,

gave the defendant *notice* of the mortgage made to *William Cook*, and of the assignment of it to the lessors of the plaintiff.

On the 27th day of *March* 1764, two days before the day of holding the assizes at *Taunton*, the said *John Lamb Cook* made an *entry* on the premisses, in order to *avoid his said lease and release* to the lessors of the plaintiff.

The question is “Whether the lessors of the plaintiff are intitled to recover the premisses.”

Glynn, Serjt., for plaintiff.

Dunning, for defendant.

LORD MANSFIELD, after stating the case minutely, now delivered the resolution of the court to the following effect.

The merits of this cause turn upon two general questions; 1st. Whether this conveyance is good, and *binds the infant*; 2dly. If it does not bind the infant, — Whether the *defendant can take advantage* of the infancy, and on *that* account object to it.

As to the first — Miserable must the condition of *minors* be; excluded from the society and commerce of the world; deprived of necessities, education, employment, and many advantages; if they could do *no* binding acts. Great inconvenience must arise to *others*, if they were *bound* by no act. The law therefore, at the same time that it protects their imbecility and indiscretion from injury through their own imprudence, enables them to do binding acts, for their *own benefit*; and, without prejudice to themselves, for the benefit of *others*.

To mention a rule or two; the reasons of which are applicable to the present case. —

If an infant does a *right act which he ought to do*, which he was ~~compellable to do~~, it shall *bind* him: as if he makes *equal partition*; if he *pays rent*; if he *admits a copyholder*, upon a surrender. But there is no occasion to enumerate instances: the authorities are express; and the reason, decisive — “Generally, whatsoever an infant is *bound to do by law*, the same shall bind him, albeit he doth it *without* suit of law.” *Co. Litt.* 172 a.

The 2d resolution in *Conny's case*, 9 *Co.* 85 b, is, “That although the infant in the case at bar was not compellable to attorn, because the manor was not conveyed by fine; yet, because by a *mean*, he was compellable to attorn, scilicet, if a fine had been levied, the attornment was good.” *Fortescue* lays it down larger, 18 *H.* 6. fo. 2. a. — “He did but that which he *ought to do*: *therefore* the attornment is good.”

“The attornment of an infant to a grant by deed is good *because it is a lawful act*: albeit he be not, upon that grant by deed, compellable to attorn.” *Co. Litt.* 315 a. The reason is manifest — A *right* and *lawful* act is not within the *reason* of the privilege; which is given, to *protect* infants from *wrong*. His being compellable by *any* mean, or in *any* way to do it, proves the act to be substantially what he ought to do.

In the case of *Holt v. Ward* — The infant's being compellable by

the *ecclesiastical* court would have answered the objection made there, as much as her being compellable by the *common* law: therefore civilians were heard.

To what end should the law permit a minor to avoid an act, which, in *any* way, through *any* mean, by *any* jurisdiction, he might be compelled to *do over again*, after it was undone? it would be assisting him to vex and injure *others*, without the least benefit to *himself*.

Another rule, which may be collected from the books, is "That the acts of an infant, which do *not touch his interest*, but take effect from an *authority* which he is *trusted* to exercise, are binding": as, where an infant-patron presents; an infant-executor duly receives and acquits, pays and administers the assets; an infant-head of a corporation joins in corporate acts; an infant-officer does the duty of an office which he may hold.

A third rule deducible from the nature of the privilege, which is given as a *shield*, and not as a *sword*, is "That it never shall be turned into an offensive weapon of *fraud* or *injustice*." As where tenant for life and infant in remainder levied a fine, — The infant reversed the fine, as to himself, for the inheritance, for nonage: yet he shall be bound by his assent to the fine and joining in it, not to enter for the forfeiture. And the fine was held good, as to the estate of tenant for life; and reversed *quoad* the infant only. *Pigot v. Russel*, 2 *Leon.* 108. *Cro. Eliz.* 124 s. c.

To see whether the reasons of these rules are applicable in the present case, it is necessary to ascertain what is in truth the nature of this transaction.

Part of the personal estate of *William Cook* consisted of £109 due from *John Bicknell*, secured by a mortgage in fee. His widow and infant-son were joint executors, and residuary legatees; and as such. intitled to this money. The fee which descended to the son was *merely as a pledge* for the money: *besides the money*, the infant had *no beneficial interest* in the land whatsoever. Upon payment, he was bound to convey, as the mortgagor should direct.

Conveying is no more than delivering up a security when it is satisfied. The money here was paid to the proper hand.

An adult, under the same circumstances, would have been guilty of a breach of trust; if he had refused: he would have been compelled to do it, and would have been condemned in costs for refusing.

By act of Parliament 7 *Ann.* c. 19, § 2, the infant was compellable to do it, during his minority.

It is much *stronger* here, that the money was *paid by the plaintiffs*; who, upon the faith of this conveyance, and the title deeds produced by *Bicknell* the mortgagor, advanced *more* money.

The *whole beneficial estate* belonged to *Bicknell*, after paying the £109. The infant's conveyance was matter of *form*, and in the nature of an *authority*, executed by *Bicknell's* direction, in favour of a third person who ventured his money upon the faith of it.

It would be *iniquitous* in the infant, to avoid it: it would be *unjust*, to set up the privilege, to make an innocent man lose his money, circumvented by his confidence in the infant's concurrence.

But it could not even have that effect. It would be nugatory, and without any effect. For, if it was avoided, he must make the same conveyance over again: he would be *compelled* to do it. A conveyance to the *defendant* would be a breach of trust.

By the case stated upon the *first* trial, it did not appear that the infant's conveyance was a right act; such as he ought, and was compellable to do. The court then ordered a new trial, to get a more correct state of the case.

Upon the *second* trial, it now comes out clear, that the infant was expressly a *trustee for the plaintiffs*. He was *paid* by them: upon the faith of the fee being in *him*, they advanced *more money*.

If the fee was in a *stranger*, the plaintiffs have the *prior* equity. If *Thorne* had been prior; his letting the mortgagor have the title-deeds, might be sufficient to *postpone* him. And the defendant had express notice.

There can be no doubt that the infant was compellable to do what he has done.

Upon the first question, we are all of opinion; "That this conveyance *binds the infant*."

But supposing it not binding against him, or those who may stand in his place —

The second question is, "Whether the *defendant* can take advantage of the infancy; and, on that account, object to the conveyance."

This depends upon two points; 1st. "Whether this conveyance be void; or voidable only": 2dly: If voidable only, whether the infant, by his *entry* before the assizes, had absolutely *avoided* it."

It is not settled, what is the *true ground* upon which an *infant's deed* is *voidable only*: — Whether "the *solemnity of the instrument* is sufficient"; or "it depends upon the semblance of *benefit to the infant*, from the matter of the deed upon the face of it."

As to the first, the *solemnity of the instrument* — We think the law is, as laid down by Perkins — That "All such gifts, grants or deeds made by infants, which do *not* take effect by *delivery of his hand*, are void: but all gifts, grants or deeds made by infants, by matter in deed or in writing, which do *take effect* by delivery of his hand, are voidable, by himself, by his heirs, and by those who have his estate." The words "Which do take effect" are an essential part of the definition; and exclude letters of attorney, or deeds which delegate a mere power and convey no interest.

In *Bro. Abr.* title "*Dum fuit infra ætatem*" pl. 1. (which cites 46 *Edw.* 3. 34.) it is noted "That a *dum fuit infra ætatem* was admitted to lie of a rent: and yet, by some, the grant of an infant was void and not voidable." But (says the book) "It is *not* so: for then this action would not lie. And besides, the *delivery* of a deed cannot be void; but only voidable."

There is no difference, in this respect, between a *feoffment*, and *deeds* which convey an *interest*. The reason is the same.

The *delivery of the deed* must be in the presence of *witnesses*, as much as the *livery of seisin*. The ceremony is as solemn. The presumption "That the witnesses would not attest, if they saw him an infant," holds equally as to both.

Littleton, who writes with great accuracy and precision, puts them both upon the same foot. He says, sect. 259, "If before the age of 21, any *deed or feoffment*, grant, release, confirmation, obligation or other writing be made by any of them &c.; all serve for nothing, and may be avoided."

In 2 *Inst.* 673, a bargain and sale *inrolled* by an infant is denied to be matter of record which the infant must avoid during his *minority*: but the book says, "He may avoid it, *when he will*."

An infant, or they who stand in his place, *can not* plead "*non est factum*," and give the infancy in evidence; but they must plead the infancy *specially*, to avoid the deed: and that plea avoids it, by relation back to the *delivery*. The reason of this is, because it has an *operation* from the *delivery*; and not because it has the *form* of a deed.

The deed of a *feme-covert* has the *form*; but she *may* plead "*non est factum*;" because it has *no* operation.

The distinction between the deeds of *femes-covert*, and of *infants*, is important: the first, are *void*; the second *voidable*.

Perkins, sect. 154, says — "And it is to be known, that a deed can not have and take effect at *every* delivery, as a deed: for, if the first delivery take any effect, the second is void. — As in case an *infant* makes a deed, and deliver the same as his deed &c.; and afterwards, when he comes of full age, delivers it again as his deed; this *second delivery is void*. But if a *married woman* deliver a bond unto me, or other writing, as her deed; this delivery is *merely void*: and therefore, if after the death of her husband, she, being single, deliver the same again unto me, as her deed; the second delivery is *good and effectual*."

Two objections were made at the bar, to this proposition; at least, in its extent. 1st. That leases by an infant, by deed, upon which *no rent* is reserved, are absolutely *void*: therefore, the criterion, "Whether the deed is void or voidable," does not depend upon the *delivery*; but upon the *matter and contents* — "Whether it may possibly be for the *infant's benefit*." 2dly. A *surrender* by an infant, by deed, is *absolutely void*: therefore all deeds are not *voidable only*.

As to the first — There are *no obiter* sayings; but there is *no sufficient authority*, clearly to outweigh the reasons against this position: I cannot find a case adjudged *singly* upon this ground. What looks the *likeliest* to an authority, is the opinion of *Wray* and *Southcote* against *Gawdy*, in *Humphreston's case*, 16 *Eliz.* *Moore* 105 and 2 *Leon.* 216; but there, the judgment was upon the *right* and *merits* of the case, and *not* upon the point of the *lease*. The question, as to the

lease, arose upon the fictitious lease to try the infant lessor of the plaintiff's title in ejectment. The two (*Wray* and *Southcote*) held "That, no rent being reserved, there was *no semblance of benefit to the infant*." Whereas, in truth, it was greatly for his benefit. The objection was turning his own privilege of infancy against him, to bar his recovery. Besides, the lease was by *parol*.

But reason soon prevailed; and it has been long settled, "That an infant *may* make a lease, *without* rent, to *try his title*." Very prejudicial leases may be made; though a nominal rent *be* reserved: and there may be most beneficial considerations for a lease though *no* rent be reserved.

What seems decisive is, "That the *lessee* can, in no case, avoid the lease, on account of the infancy of the lessor:" which shews it *not* to be void, but *voidable only*. And it is *better for infants*, that they should have an *election*.

As to the second — The authority of *Lloyd v. Gregory*, *Cro. Car.* 502; *Sir William Jones*, 405; 2 *Ro. Abr.* 24; 1 *Ro. Abr.* 728, was cited: and sayings *arguendo*, in *Thompson v. Leach*, 3 *Lev.* 284; 2 *Ventr.* 198, 199 [and in several other reports].

The case of *Lloyd v. Gregory* was determined upon the special verdict, by three judges; of whom, *Sir William Jones* and *Croke* were two.

Sir William Jones reports, "That the second lease being void made an end of the question; and that the judges gave no opinion upon the other points."

The note in *Croke*, *Cro. Car.* 502, does not say a word of the *only* ground, of the judgment; but rather supposes the second lease *good*, by arguing, "That there being no increase of term, or diminution of rent, it had no semblance of benefit." *Croke's* note might be confounded with what passed upon the trial at bar: for *Roll* states sayings to that effect upon the trial at bar. 1 *Ro. Abr.* 728.

But *Sir William Jones* is certainly right: for the *second* lease was *void*. And no surrender, express or implied, in order to, or in consideration of a new lease, would bind; if the *new* lease is *absolutely void*: for, the cause, ground, and condition of the surrender fails.

In *Thompson v. Leach*, (which was a most favourable case for the plaintiff,) much is said, in argument, "To prove the surrender of an infant or lunatic to be void;" to get rid of some doctrine laid down in *Whittingham's* case, 8 *Co.* 43 *H.* 45 *Eliz.*, "That the remainder-man, injured by the act, could not avoid it." But more is said to overturn that doctrine. There is no difference, in this respect, between the heir in tail and the remainder-man: *neither* claims *under* him whose act is in question; but *both* claim *per formam doni*.

In *Palmer*, 254, *Dodderidge* denies the doctrine; and says, "He in remainder, and the donor, *shall* take advantage of infancy:" which is agreeable to *Littleton's* reasoning §635 — it should seem against reason, that a feoffment made by an infant should grieve or hurt *another*, to take from them their entry &c."

Suppose the comparison between an infant and a man *non compos* just, (which it is *not*,) the point of "The surrender being void or voidable" was not necessary to the judgment in that case.

I know of no judgment, upon the ground "That such a surrender is *void*." Most undoubtedly, the *other* party can not say so. If an infant was to surrender an unprofitable lease; and, after acceptance, the premisses should be burnt, overflowed, or otherwise destroyed; the *lessor* never could say the surrender was void. There is no instance where the *other* party to a deed can object, on account of infancy. Consequently, the infant may let the surrender stand, or avoid it: which proves it to be *voidable only*.

If a *new* case should arise, where it would be *more beneficial to the infant*, "That the deed should be considered as void;" if he might incur a forfeiture, or be subject to damages, or a breach of trust, in respect of a third person, *unless* it was deemed void; — the *reason* of the privilege would warrant an exception, in *such* case, to the general rule.

Powers of attorney are an exception to the general rule, as to *deeds*: and a power to *receive seisin* is an exception to *that*. The *END* of the privilege is "To *protect* infants." To *that* object, therefore, *all* the rules and their exceptions must be directed.

But be the point upon the *solemnity of the delivery*, as it may, (for there are respectable sayings the other way;) it is not necessary to our determination. For we are all of opinion, "That the £109 received, and the other circumstances of the transaction, *shew* a *SEMBLANCE* OF *BENEFIT*, *sufficient* to make it *voidable ONLY*, upon the *matter* of the conveyance."

If it be *voidable only*, the second point is, "Whether the infant, by his *entry* before the assizes, (which appears to be *during his minority*.) has *avoided* it."

At the *common law*, the *only* conveyance *in pais*, of the freehold and inheritance of land, with transmutation of possession, was by *feoffment*. If it was tortious, the disseisee was obliged to *enter*, to revest his possessory title: and then he might bring an action of trespass. So, in the case of feoffments by an infant; he might *enter during his minority*, to revest his possessory right, for the sake of the profits; but still the feoffment was *voidable only*; and he might *elect* to confirm it, when he attained his full age.

The *reason* why an infant can not bring any writ analogous to a *dum fruit infra ætatem*, *during his minority*, is, "That his *election may not be bound* by the judgment."

Whether an entry be of any *use* in the present case, is not material: it is sufficient, that it can not have any *larger* effect, than in the case of a *feoffment*. The infant is alive, still a *minor*. The defendant can not elect for him: he is a *mere stranger*, in every view; and has no estate affected by the conveyance.

We are all of opinion, "That the *plaintiffs ought to recover*." And

it is well for the defendant, we are of this opinion. He would get nothing by defeating the plaintiffs, *here* : for, finally, in *another* mode of proceeding, the conveyance must be *confirmed*; and the defendant would be to pay all the *costs* here and there.

It is fortunate for the suitors on both sides, when, consistent with rules and forms of proceeding, *that justice*, which must be the *final* determination of the question, may be done in the *first* stage of the litigation.

The consequence of what has been said, is, that

The postea must be delivered to the plaintiffs.

VOID AND VOIDABLE.

void

“THERE is in our books great looseness and no little confusion in the use of the terms *void* and *voidable*, growing, perhaps, in some degree, out of the imperfection of our language. There are at least four kinds of defects which are included under these expressions, while we have but those two terms to express them all. 2 Kent's Com. 234 ; 7 Bac. Ab. 64, Void and Voidable ; 22 Vin. Ab. 12, Void and Voidable ; Jacob's Law Dict. Void.

“ I. Proceedings may be wholly void, without force or effect as to all persons and for all purposes, and incapable of being or being made otherwise. This is the broadest sense of the word, but the cases which fall within this signification are probably not numerous.

“ II. Things may be void as to some persons and for some purposes, and, as to them, incapable of being otherwise, which are yet valid as to other persons, and effectual for other purposes. As a deed, executed by an idiot, and by others capable of contracting, may be void as to the idiot, and yet binding as to the others. An instrument in form of a deed, but without a seal, may be void as a conveyance, and yet be binding for some other purposes.

“ III. Things may be void as to all persons and for all purposes, or as to some persons and for some purposes, though not so as to others, until they are confirmed ; but though said to be void, they are not so in the broadest sense of that term, because they have a capacity of being confirmed, and after such confirmation they are binding. For this kind of defect our language affords no distinctive term. They are strictly neither *void*, that is, mere nullities, nor voidable, because they do not require to be avoided, but until confirmed they are without validity. They are usually spoken of as *void*, and as usage is the only law of language, they are so called correctly. It is, therefore, always to be considered an open question, to be decided by the connection and otherwise, whether the term *void* is used in a given instance in one or the other of these in some respects dissimilar senses.

"IV. Contracts and proceedings are properly called *voidable*, which are valid and effectual until they are avoided by some act. *Prima facie* they are valid, but they are subject to defects, of which some person has a right to take advantage, who may by proper proceedings for that purpose entirely defeat and destroy them. Voidable contracts are in general, perhaps always, like the last class referred to, capable of confirmation by the party who has the right to avoid them. 2 Bouv. Inst. § 1321.

"Matters which are properly *voidable* are very commonly spoken of as *void*. *Smith v. Saxton*, 6 Pick. 487. Technically and legally speaking, they are improperly so called. But the word *void* is so often used by good writers, and even by legal writers, in the sense of invalid, ineffectual, or not binding, that it can hardly be said that this is not a correct and legitimate use of the term.

"Our books are full of examples of the loose and inaccurate use of these words, and many difficult questions have grown out of this circumstance. They are so common that we think no strong inference is to be justly drawn from the unqualified use of these words, as to the particular kind or degree of invalidity meant, where the attention of the court is not clearly directed to that point." — BELL, J., in *State v. Richmond*, 26 N. H., p. 237 to 239.

"English writers on law generally assume that all the cases in which the legal result of an act is affected by these special circumstances may be covered by saying that the act is 'void' or 'voidable.' But these are words of very uncertain meaning. The word 'void,' where it is used at all accurately, means, I think, devoid of the legal result contemplated.¹ The word 'voidable' means, I suppose, that the result may be made 'void' by some one. But the questions remain, by whom and by what process? Continental lawyers make a triple division. First they set apart those cases in which the contemplated legal result fails altogether — as, for example, a will of lands made by an infant. Such acts they call 'absolutely void.' In the next class they place cases in which, as regards some persons, the act fails altogether to produce its contemplated legal result, but, as regards others, the result is produced — as, for example, in the case of a bishop's lease exceeding the period prescribed by the law, which is good as against the bishop

¹ "See Pollock on Contracts, 3d ed., p. 7. Sometimes acts are spoken of as if they were void of all legal result whatsoever. This is not perhaps impossible, but it must be rare. The word 'void' cannot, I think, be conveniently extended further than I have extended it in the text. Nor does current legal language warrant our extending even the term 'absolutely void' beyond this. Thus the contracts of an infant are with some exceptions declared 'absolutely void' by the Infants' Relief Act, 1874, but they have, nevertheless, important legal effects. If the infant, when of age, is sued, and does not plead infancy, judgment will be given on them; money paid on them could not be recovered back; and I should think it clear that property delivered in accordance with them would pass to the receiver. See Pollock on Contracts, p. 63, third ed."

Watts v. Cresswell

FACTS:- Bill to have discovery of D's title to lands mortgaged to P, and to ~~have~~ have account of rents and profits.

D was employed by his father to solicit P to lend a sum of money on a mortgage of the land. D, being 20 yrs. of age, witnessed the execution of the mortgage deed and the payment of the money. Later D was privy to the taking by his father of £100 more on the mortgage. D refuses to pay mortgage a and claims land as remainderman, by virtue of a settlement.

DECISION:- Tho D is not liable as a witness to the mortgage, he is liable because being nearly of age he was concerned in the fraud. If an infant is old enough to contrive a fraud, he ought to make satisfaction for it.

but not as against his successor. These acts they call 'relatively void.' Then the third class comprises those acts which produce their legal result; but this result can be set aside by the action of some person concerned, either with or without restitution — as, for example, a contract induced by fraud. These acts are called 'voidable.' I think there is some advantage in this triple classification, but it does not carry us far towards attaching a precise meaning to the terms employed; and in the hot contests that have taken place whether an act is void, or absolutely void, or voidable, it seems to me that the disputants have frequently used the words in different senses.

"There has been a long pending discussion, not yet closed, as to whether contracts defective in form are to be considered as void. The discussion has, I think, been complicated by its not being clearly agreed in what sense the word 'void' is to be used. Many persons who deny that contracts defective in form are void, apparently only mean to say that they are not entirely devoid of legal result. Other persons seem to mean, when they assert that they are void, that they do not produce the legal result contemplated. Of course, it is possible that the same contract should be void in the last of these two senses and not so in the first. In fact, I have little doubt that every contract defective in point of form is void in the last of these two senses; whereas a contract hardly ever is so in the first." — MARKBY'S *Elements of Law*, 3d ed., §§ 274, 651.

WATTS v. CRESWELL. *13 Q.B.*

George I. 9 Viner's Abridgment, 415.

IN CHANCERY. Bill to have a discovery of the defendant's title to lands in B. mortgaged to the plaintiff, and likewise to have an account of the rents and profits thereof, &c. The case was, the defendant's father having occasion to borrow the sum of £300, the defendant was employed by his father to solicit the plaintiff to lend that sum upon a mortgage of the lands in B. which the father made affidavit of that he was seised in fee, and that the lands were free from incumbrances; the defendant, being then about the age of 20 years, did carry a feoffment in fee and fine of the lands of the defendant's father to the counsel of the plaintiff, and the title was approved of, and the money lent, and a mortgage made to the plaintiff, and the defendant was a witness to the execution of the mortgage-deed, and likewise to the payment of the money. The defendant's father, after the defendant came of full age, took £100, more upon the same mortgage, and the defendant was privy to that transaction, but not a witness to the deed or payment of the money. The defendant by his answer says, that at the time of

making the original mortgage, he had heard the lands were settled upon him after the death of his father, but had never seen the settlement. The defendant after the death of his father refuses to pay the mortgage, and claims the lands as remainder-man in tail by virtue of a settlement by his grandfather upon the marriage of his father, &c. Counsel for the plaintiff insisted that the defendant, though an infant at the time of making the mortgage, was liable to make a satisfaction, because he was party to the fraud, and was privy to the whole transaction, and aiding and assisting to the cheat, and that though an infant cannot bind himself by contract at common law, yet he is liable to actions of tort, as trespass, case for words, &c. So is he liable to a forfeiture upon a condition in fact, or implied, &c. So in equity he is liable to make satisfaction for a fraud, &c. Per COWPER, C., if an infant having a remainder upon an estate for life be a witness to a mortgage made by tenant for life, I do not think this would bind the infant, because if he was made a party to the deed, and sealed it, yet that would not bind him, and that is a much stronger case; yet I am of opinion in this case the defendant is liable, and ought to make satisfaction to the mortgagee, because at the time of this transaction he was very near being of full age, and solicited the plaintiff to lend the money, and produced this feoffment in fee to his father (which appears now to be forged), and was principally concerned all along in the fraud, when he knew at the same time, as he admits by his answer, that his father was but tenant for life, with remainder to himself. If an infant is old and cunning enough to contrive and carry on a fraud, I think in a court of equity he ought to make satisfaction for it. Decreed accordingly.

THE COURT, IN SAVAGE v. FOSTER.

9 George I. 9 Modern, 35, p. 37.

[CASE in Chancery, where a married woman was held to be estopped.]

Now when anything in order to a purchase is publicly transacted, and a third person knowing thereof, and of his own right to the lands intended to be purchased, and doth not give the purchaser notice of such right, he shall never afterwards be admitted to set up such right to avoid the purchase; for it was an apparent fraud in him not to give notice of his title to the intended purchaser, and in such case infancy or coverture shall be no excuse; for though the law prescribes formal conveyances and assurances for the sales and contracts of infants and *feme coverts*, which every person who contracts with them is presumed to know; and if they do not take such conveyances as are necessary, they are to be blamed for their own carelessness, when they act with their eyes open; yet when their right is secret, and not known to the purchaser, but to themselves, or to such others who will not give the

Savage v. Foster

FACTS:- Case in Chancery, where a married woman was held to be estopped.

The Court:- In a public transaction of a purchase a ~~third~~ party, having rights in the property, must give purchaser notice of such right or he will be liable in fraud, and infancy or coverture will be no excuse.

Sims v. Everhardt

Bill by former ~~infant~~ after her majority to set aside deed made ~~during~~ infancy.

The Court:- At the time she asserted she was of age and competent to convey. Fraudulent representation of capacity to convey cannot take place of actual conveyance. She cannot be estopped because she never contracted.

purchaser notice of such right, so that there is no laches in him, this court will relieve against that right, if the person interested will not give the purchaser notice of it, knowing he is about to make the purchase; neither is it necessary, that such *infant* or *feme covert* should be active in promoting the purchase, if it appears, that they were so privy to it that it could not be done without their knowledge.

STRONG, J., IN SIMS v. EVERHARDT.

1880. 102 U. S. 300, pp. 312, 313.

[BILL by former infant, after her majority, to set aside her deed made during infancy.]

STRONG, J., . . . The remaining question is whether she is estopped by anything which she has done from asserting her right to the land in controversy. In regard to this very little need be said. It is not insisted that she did anything since she attained her majority which can work an estoppel. All that is claimed is that when she made her deed she asserted that she was of age and competent to convey. . . . The question is, whether acts and declarations of an infant during infancy can estop him from asserting the invalidity of his deed after he has attained his majority. In regard to this there can be no doubt, founded either upon reason or authority. Without spending time to look at the reason, the authorities are all one way. An estoppel in pais is not applicable to infants, and a fraudulent representation of capacity cannot be an equivalent for actual capacity. *Brown v. McClune*, 5 Sandf. (N. Y.) 224; *Keen v. Coleman*, 39 Pa. St. 299. A conveyance by an infant is an assertion of his right to convey. A contemporaneous declaration of his right or of his age adds nothing to what is implied in his deed. An assertion of an estoppel against him is but a claim that he has assented or contracted. But he can no more do that effectively than he can make the contract alleged to be confirmed.¹

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¹ As to the effect of the silence of the infant when witnessing the conveyance; compare *Evroy v. Nicholas*, 6 George 2, 2 Eq. Cas. Abr. 488, with *Upshaw v. Gibson*, 1876, 53 Mississippi, 341. — ED.

CHAPTER III.

RIGHT TO AFFIRM OR DISAFFIRM. — IN WHAT CASES IT EXISTS. — WHEN AND BY WHOM IT MAY BE EXERCISED, AND WITH WHAT EFFECT.

WAPLES v. HASTINGS.

1842. 3 *Harrington (Delaware)*, 403.¹

JUDGMENT confessed on bond and warrant of attorney, dated 18th of February, 1836. On the application of defendant, rule to show cause why the judgment should not be vacated, on the ground that the defendant was an infant at the date of the bond and warrant of attorney.

At the hearing, it appeared that the defendant was born on the 24th of April, 1816. He was acting as a man of full age in 1836, doing business as a partner with his father; generally understood to be of age, and voted at the general election in that year. In March, 1840, he executed a paper under hand and seal, expressly to recognize and confirm this bond and warrant of attorney given to William D. Waples, in February, 1836. The judgment was confessed on the 23d of February, 1836.

Houston and *J. A. Bayard*, for the rule.

Ridgely, *contra*.

By THE COURT. The bond and warrant of attorney of an infant are void. (3 Com. Dig., *Enfant B.*; Co. Litt. 172, *a.*)

The court, on motion, will set aside a judgment on a warrant of attorney executed by an infant. (3 Com. Dig., *Enfant B.*; 2 Wm. Blac. 1133; 1 H. Blac. 75, *Saunderson v. Marr.*)

Even if the contract could be confirmed after full age, it would not set up the warrant of attorney. (9 Eng. Com. Law Rep. 256, *Thornton v. Illingworth.*)

The bond and warrant of attorney failing, the judgment is without authority and must be vacated.

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Rule absolute.

¹ Arguments omitted. — Ed.

Waples v. Hastings

FACTS:- Judgment confessed on warrant of attorney. D applies for rule to have judgment set aside on ground that D was an infant at time of making the warrant. Facts showed that D was acting as man of full age at 20, and was generally supposed to be so, when the warrant was executed.

DECISION:- The warrant is void. If the contract could be confirmed after full age, it would not set up the warrant. The judgment must be vacated.
Rule absolute.

COURSOLLE v. WEYERHAUSER.

1897. 69 *Minnesota*, 328.¹

ACTION to determine adverse claims to certain land.

In 1856, pursuant to the Act of Congress of July 17, 1854, there was issued to the plaintiff 320 acres of what is commonly called "half-breed scrip." This scrip was not assignable, but had to be located, and the land entered in the name of the scribee. In 1870, the plaintiff, then about twenty years old, for a valuable consideration paid to him, delivered and agreed to sell his scrip to Dorr. Plaintiff then executed two powers of attorney, by one of which he appointed Dorr his attorney to locate the land; and by the other he constituted Dorr his attorney, with authority to sell and convey "any and all lands to or in which he then was, or might thereafter become, in any way entitled or interested by virtue of said scrip." Assuming to act under these powers, Dorr, in October, 1874, located the scrip on the land in controversy; and in January, 1874, in the name of the plaintiff sold and conveyed the land, with covenants of title, to one Brown, under whom the present defendants claim. Certain acts and omissions of the plaintiff, after he came of age, "constituted a ratification on plaintiff's part of what had been done, as far as those things were capable of ratification."

MITCHELL, J. . . . The rule is that the act to be ratified must be voidable merely, and not absolutely void; and the question remains — which to our minds is the most important one in the case — whether the act of a minor in appointing an agent or attorney is wholly void, or merely voidable. Formerly the acts and contracts of infants were held either void, or merely voidable, depending on whether they were necessarily prejudicial to their interests, or were or might be beneficial to them. This threw upon the courts the burden of deciding in each particular case whether the act in question was necessarily prejudicial to the infant. Latterly the courts have refused to take this responsibility, on the ground that, if the infant wishes to determine the question for himself on arriving at his majority, he should be allowed to do so, and that he is sufficiently protected by his right of avoidance. Hence the almost universal modern doctrine is that all the acts and contracts of an infant are merely voidable. Upon this rule there seems to have been ingrafted the exception that the act of an infant in appointing an agent or attorney, and consequently all acts and contracts of the agent or attorney under such appointment, are absolutely void. This exception does not seem to be founded on any sound principle, and all the text-writers and courts who have discussed the subject have, so far as we can discover, conceded such to be the fact.

On principle, we think the power of attorney of an infant, and the

¹ Statement abridged from opinion. Only so much of the case is given as relates to a single point. — ED.

acts and contracts made under it, should stand on the same footing as any other act or contract, and should be considered voidable in the same manner as his personal acts and contracts are considered voidable. If the conveyance of land by an infant personally, who is of imperfect capacity, is only voidable, as is the law, it is difficult to see why his conveyance made through an attorney of perfect capacity should be held absolutely void. It is a noticeable fact that nearly all the old cases cited in support of this exception to the general rule are cases of technical warrants of attorney to appear in court and confess judgment. In these cases the courts hold that they would always set aside the judgment at the instance of the infant, but we do not find that any of them go as far as to hold that the judgment is good for no purpose and at no time.

The courts have from time to time made so many exceptions to the exception itself that there seems to be very little left of it, unless it be in cases of powers of attorney required to be under seal, and warrants of attorney to appear and confess judgment in court. See Freeman's note to *Craig v. Van Bebber*, 18 Am. St. Rep. 629 (s. c. 100 Mo. 584, 13 S. W. 906); Schouler, Dom. Rel. § 406; Ewell's Lead. Cas. 44, 45, and note; Bish. Cont. § 930; Metc. Cont. (2d ed.) 48; *Whitney v. Dutch*, 14 Mass. 457-463; *Bool v. Mix*, 17 Wend. 119-131.

Hence, notwithstanding numerous general statements in the books to the contrary, we feel at liberty to hold, in accordance with what we deem sound principle, that the power of attorney from plaintiff to Dorr, and the deed to Brown under that power, were not absolutely void because of plaintiff's infancy, but merely voidable, and that they were ratified by him after attaining his majority. [Remainder of opinion omitted.] *Judgment [for defendants] affirmed.*

BUCK, J. I dissent from the result arrived at in the foregoing opinion.

WHITNEY v. DUTCH.

1817. 14 *Massachusetts*, 457.¹

ASSUMPSIT on a promissory note, made by the defendants to the plaintiffs, on the 18th of December, 1811, for \$847.76.

The defendant Dutch was defaulted. The defendant Green pleaded, — 1. The general issue; 2. That he was under age at the time when the note was made. The plaintiffs replied, that, after he came of age, he agreed to and confirmed the promise; to which he rejoined, that he did not so agree; on which also issue was joined.

It appeared at the trial, which was had at the last November term in this county before Jackson, J., that Dutch & Green, while the latter

¹ Arguments omitted.—Ed.

was under age, had agreed to be partners, and as such had often dealt with the plaintiffs. The note in question was signed by Dutch, using the firm and style of the house of Dutch & Green at a time when the latter was under age.

In March, 1816, after Green arrived at full age, the plaintiffs applied to him for payment of the note; when he acknowledged that it was due, and promised that, on his return to Eastport, where he resided, he would endeavor to procure the money and send it to the plaintiffs, saying at the same time that it was hard for him to pay it twice; he alleging, as it was understood, that the supposed partnership had been a long time before dissolved; and that Dutch had taken the whole stock, and agreed to pay all the debts of the company.

The counsel for the defendant contended that the implied power of one partner to bind the other was void in this case; as Green was a minor at the time of making the note, and therefore could not empower any agent or attorney to bind him in any manner; that the note was therefore void as to him, and not merely voidable; and so the supposed promise could not be confirmed or ratified by the subsequent promise or agreement, which was proved, as above mentioned.

The judge, intending to reserve the question for the consideration of the whole court, directed a verdict for the plaintiffs on both issues, which was returned accordingly.

If the court should be of opinion that the defendant Green was, under these circumstances, liable to the plaintiffs for the amount due on this note, the verdict was to stand, and judgment entered accordingly; otherwise the verdict was to be set aside, and a verdict entered for the defendants.

Leland, for defendants.

Thurston, for plaintiffs.

PARKER, C. J. The question presented to the court in this case, and which has been argued, is, whether the issue on the part of the plaintiffs is maintained by the evidence reported.

The first objection taken by the defendants' counsel is, that no express promise is proved after the coming of age of the defendant. By the authorities, a mere acknowledgment of the debt, such as would take a case out of the statute of limitations, is not a ratification of a contract made during minority. The distinction is undoubtedly well taken. The reason is, that a mere acknowledgment avoids the presumption of payment, which is created by the statute of limitations; whereas the contract of an infant may always, except in certain cases sufficiently known, be voided by him by plea, whether he acknowledges the debt or not; and some positive act or declaration on his part is necessary to defeat his power of avoiding it.

But the terms of ratification need not be such as to import a direct promise to pay. All that is necessary is that he expressly agrees to ratify his contract; not by doubtful acts, such as payment of a part of the money due, or the interest; but by words, oral or in writing, which import a recognition and a confirmation of his promise.

defense

In the present case, the defendant acknowledged that the money was due, when called upon to pay the demand; and promised that he would endeavor to procure the money upon his return home, and send it to the plaintiff. ~~This was sufficient to satisfy the jury that he assented to and ratified the original promise~~; for it would be a distortion of language to suppose that he meant only to endeavor to persuade Dutch to pay the money; and if he succeeded, that he, Green, would send it to the plaintiff.

But the other point made in the defence is more difficult, and presents a question new to us all. This is, that the note, being signed by Dutch for Green, was void in regard to Green; because he was not capable of communicating authority to Dutch to contract for him; and that, being void, it is not the subject of a subsequent ratification.

No such question appears to have occurred in our courts, nor in those of England, or of the neighboring States. Partnerships have not been uncommon between adults and infants; and simple contracts, signed by one for both, undoubtedly have often been made.

It is unfavorable to the principle contended for by the counsel for Green, that no such case has been found; for this silence of the books authorizes a presumption that no distinction has been recognized between acts of this kind done by the infant himself, and those done for him by another. We must, however, examine the principles by which the contracts of infants are governed, and see if, by any analogy to settled cases, the present defence can be maintained.

It is admitted, generally, that a contract made by an infant, although not for necessities, is only voidable; and that an express adoption of it, after he comes of age, will make it valid from its date. Nor does the law require that he shall be sued, as upon the new promise; but gives life and validity to the old one, after it is thus assented to. But it is urged that this doctrine applies only to those contracts which are made by the infant personally; and that the delegation of power by him to another of full age, to act for him, is utterly void; and that no contract, made in virtue of such delegation, can subsist, so as to be made good by subsequent agreement or ratification.

If we confine ourselves to the letter of the authorities, it would seem that this doctrine is correct; for we find that, in the distinctions made in the books between the void and voidable acts of an infant, a power of attorney is generally selected, by way of example, as an act absolutely void; unless it be made to enable the attorney to do some act for the benefit of the infant, such as a power of attorney to receive seisin, in order to complete his title to an estate.

The books are not very clear upon this subject. All of them admit a distinction between void and voidable acts; and yet disagree with respect to the acts to be classed under either of those heads. One result, however, in which they all appear to agree, is stated by Lord Mansfield, in the case of *Zouch v. Parsons*, cited in the argument, viz., that whenever the act done *may be* for the benefit of the infant,

it shall not be considered void; but that he shall have his election, when he comes of age, to affirm or avoid it; and this is the only clear and definite proposition which can be extracted from the authorities.

The application of this principle is not, however, free from difficulty; for, when a note or other simple contract is made by an infant himself, it may be made good by his assent, without any inquiry whether it was for his benefit or to his prejudice. For, if he had made a bad bargain in a purchase of goods, and given his promissory note for the price, and, when he came of age, had agreed to pay the note, he would be bound by this agreement, although he might have been ruined by the purchase. Perhaps it may be assumed as a principle, that all simple contracts by infants, which are not founded on an illegal consideration, are strictly not void, but only voidable, and may be made good by ratification. They remain a legal *substratum* for a future assent, until avoided by the infant; and if, instead of avoiding, he confirm them, when he has a legal capacity to make a contract, they are in all respects like contracts made by adults.

With respect to contracts under seal also, they are in legal force as contracts, until they are avoided by plea. Whether they can, in all cases, as it is clear they can in some, such as leases, be ratified, so as to prevent the operation of a plea of infancy, except by deed, need not now be decided. A deed of land, by an infant having the title, would undoubtedly convey a seisin; and the grantee would hold his title under it, until the infant, or some one under him, should by entry or action avoid it.

Perhaps it cannot be contended, against the current of authorities, that an act done by another for an infant, which act must necessarily be done by letter of attorney under seal, is not absolutely void; although no satisfactory reason can be assigned for such a position. But as this is a point of strict law, somewhat incongruous with the general rules affecting the contracts of infants, it is not necessary nor reasonable to draw inferences which may be repugnant to the principles of justice, which ought to regulate contracts between man and man.

The object of the law, in disabling infants from binding themselves, is to prevent their being imposed upon and injured by the crafty and designing. This object is in no degree frustrated by giving full operation to their contracts, if, after having revised them at mature age, they shall voluntarily and deliberately ratify and confirm them. It is enough that they may shake off promises, and other contracts, made upon valuable consideration, if they see fit to do it, when called upon to perform them. To give them still another opportunity to retract, after they have been induced, by love of justice, and a sense of reputation, to make valid what was before defective, will be to invite them to break their word and violate their engagements.

If it be true that all simple contracts, made by infants, are only voidable, the inquiry in this case should be, whether the facts stated furnish an exception to this general rule, or whether the contract now sued is in any sense different from a simple contract.

The only ground for the supposed exception is, that the note declared on was not signed by the infant himself, but by Dutch, claiming authority to sign his name as a co-partner. If the authority required a letter of attorney under seal, the exception would be supported by the authorities which have been alluded to.)

But it is well known that co-partners may, and generally do, undertake to bind each other, without any express authority whatever. Indeed, the authority to do so results from the nature and legal qualities of co-partnership. And without any such union of interests, one man may have authority to bind another by note or bill of exchange, by oral, or even by implied authority. The case of a deed, therefore, is entirely out of the question; so that the defendant does not bring himself within the letter of the authorities, and certainly not within the reason on which they are founded. Then, upon principle, what difference can there be between the ratification of a contract made by the infant himself, and one made by another acting under a parol authority from him? And why may not the ratification apply to the authority as well as to the contract made under it?

It may be said that minors may be exposed, if they may delegate power over their property or credit to another. But they will be as much exposed by the power to make such contracts themselves, and more, for the person delegated will generally have more experience in business than the minor. And it is a sufficient security against the danger from both these sources, that infants cannot be prejudiced; for the contracts are in neither case binding, unless, when arrived at legal competency, they voluntarily and deliberately give effect to the contract so made. And in such case justice requires that they should be compelled to perform them.

Upon these principles, we are satisfied with the verdict of the jury, and are confident that no principles of law or justice are opposed by confirming it.

Judgment on the verdict.

RILEY v. MALLORY.

1866. 33 *Connecticut*, 201.¹

ASSUMPSIT for money had and received, appealed from a justice of the peace, and tried to the jury in the Superior Court, on the general issue with notice, before PARDEE, J.

The plaintiff was a minor. On the trial he claimed, and offered evidence to prove, that in August, 1863, he purchased a gun of the defendant, and paid therefor the agreed price of five dollars; that on or about the twenty-fifth of September, 1863, having determined to rescind the contract of purchase, he notified the defendant that he rescinded the contract, tendered back the gun to him in as good condition as

¹ Only so much of the report is given as relates to a single point. — ED.

when he took it, and demanded from him the five dollars paid him, and that the defendant refused to receive the gun and return the purchase money. The gun was used somewhat by the plaintiff and one or two others to whom he loaned it, after the purchase and before the return of it.

The defendant requested the court to charge the jury that if the plaintiff advanced money on a voidable contract which he afterwards rescinded, he could not recover the money back, because it was lost to him by his own act; also that money paid for a valuable consideration by a minor with his own hand in the ordinary course of trade, when the minor has enjoyed for a considerable time the use of the article paid for, cannot be recovered back unless fraud has been practised on the minor; also that if any substantial depreciation in the value of the article received by the minor had taken place, the minor must show that on returning the article he offered to pay for the injury or to allow therefor on the money repaid, or he could not recover. But the court charged the jury that the plaintiff was entitled to recover in this case, if they found from the evidence that he had notified the defendant that he rescinded the contract of purchase, and that he then tendered to the defendant the gun without any substantial depreciation in its value and demanded the return of the purchase money; and ~~that it was for the jury to determine whether the plaintiff did then return the gun to the defendant without any substantial diminution in its value.~~ *Instr*

Verdict for plaintiff; motion for new trial.

Brewster, with whom was *Averill*, in support of the motion.

The instruction requested by the defendant as to the recovery of money paid by an infant on an executed contract was a quotation from *Macpherson on Infants*, 488.

The present case is, it is believed, without precedent. The reason of the established exception in case of money paid is founded on its practical convenience and the peculiar function of money as the representative of value. The exclusion of minors from all money purchases would be no privilege to them; and complete exclusion must follow if tradesmen are liable to have goods sold for cash and without fraud returned after being used, whenever the infant customer is tired of his bargain. Other species of personal property can be identified and followed if sold without authority by an infant (being still the property of the rightful possessor), while money cannot. Hence the responsibility in the case of money paid is put on the one who intrusts the infant with money, not on the one who receives the money for a fair consideration, provided the infant has used and received a benefit from the thing purchased. The use binds the otherwise voidable contract.

Taylor, contra.

BUTLER, J. The claims urged by the defendant in this case cannot be sustained. It is apparent that he has been misled by hasty text

writers who did not fully comprehend the true principles and condition of the law relating to infancy.

The privilege of an infant to avoid contracts which are injurious to him, and rescind those which are not, is not an exception to a general rule, but a general rule with exceptions. The law assumes the incapacity of an infant to contract. It also recognizes the fact that the limitation of infancy is arbitrary; that it is indispensably necessary that an infant should be at liberty to contract for necessities; and that he may happen to make other contracts which will be beneficial to him. It does not, therefore, forbid him to contract, but gives him for his protection the privilege of avoiding contracts which are injurious to him and rescinding all others, whether fair or not, whether executed or executory, and as well before as after he arrives at full age — excepting from the operation of the privilege only contracts for necessities, contracts which he may be compelled in equity to execute, and executed contracts where he has enjoyed the benefit of them and cannot restore the other party to his original position. These exceptions are founded in the necessities of the infant, or required by a just regard for the equitable rights of others. The exception which the defendant claims to exist, founded on the simple fact that the infant has paid money in the purchase of an article not a necessary, or upon a contract which would be otherwise voidable, has no element of necessity or equity to require or sustain it, and no settled recognition in the law.

Fifty years ago the Hon. Tapping Reeve, who had been for many years a judge of the Superior Court, and for one year chief justice of the State, and who conducted one of the earliest law schools in the country, published his carefully prepared lectures on the law relative to the domestic relations. In his chapter on infants he states the law in relation to their privilege thus: — “It is the privilege of an infant that he may rescind his contracts at pleasure. In ordinary cases he can avail himself of this privilege. It is not a matter of any moment whether the contract is a fair one or not, the infant may rescind it” (page 227). Again, on page 254, he says, “It is an universal rule that all executory contracts which are voidable on the ground of infancy may be avoided during infancy by the infant as well as afterwards, as when a minor promises to pay, etc. So, too, *all* contracts respecting property which are *executed* by delivery of some article on *payment of money*, may be rescinded by the minor both before and after the time of his coming of age.” To these general rules he states the three exceptions; viz., contracts for necessities; contracts, if not unequal, to effect what the infant is compellable in chancery to do, as making partition, releasing a mortgage, executing a trust, etc.; and contracts under which the infant has so enjoyed or availed himself of the consideration that the parties cannot be restored to their original position. He states no other exceptions, and there were no others then known in the law. That work was then and is still an authority, and such then was and ever has been the law in this State, and it was correctly stated to the jury.

Two years after the publication of the work of Judge Reeve, and in 1818, the case of *Holmes v. Blogg*, was decided in the Common Pleas in England. That was a case where an infant and adult, as partners in trade, had taken a lease of premises and used them in their business, the infant having paid the rent in advance. When the infant came of age he dissolved the partnership, rescinded the contract of lease, and brought an action to recover the rent paid. He did not recover. As he had enjoyed the use of the premises and could not put the lessor in his original position, he was within the third exception stated by Judge Reeve, and so the court should have held. But Gibbs, C. J., branching off unnecessarily, and quoting a dictum attributed to Lord Mansfield, that "if an infant pays money with his own hands, without a valuable consideration for it, he cannot get it back again," put the case on that ground, and made it an erroneous and mischievous precedent. The case was followed blindly in 1827, by the Supreme Court of New York in *McCoy v. Hoffman*, 7 Cow. 84. But Judge Kent, who published his commentaries soon after, although he cited those cases as authorities for the position that "if an infant pays money on his contract and enjoys the benefit of it he cannot recover back the consideration paid," yet had the good sense to avoid the error into which Chief Justice Gibbs had fallen. The case of *Holmes v. Blogg* was overruled by the Common Pleas in England in 1833, in *Corpe v. Overton*, 10 Bingham, 252, where it was held that an infant *might* recover back money which he had paid in advance towards a share of the defendant's trade. So in the State of New York in 1845, the case of *McCoy v. Hoffman* was expressly overruled in *Medbury v. Watrous*, 7 Hill, 110. See also *Bent v. Osgood*, 19 Pick. 572. No court in England or this country, it is believed, would now follow *Holmes v. Blogg*, or pay any attention to the senseless dictum attributed to Lord Mansfield.

The extracts cited by defendant's counsel from Story on Sales were based on the overruled cases of *Holmes v. Blogg* and *McCoy v. Hoffman*, but the annotator of the third edition, Mr. Perkins, has corrected the error in effect by adding the true rule in a foot-note, as follows:— "But the infant may renounce his purchase and recover back the purchase money upon the restoration of the property purchased," citing a number of recent American cases. Future editions of the other textbooks cited will probably contain similar corrections, and the law be purged of the error thus introduced in *Holmes v. Blogg*.

New trial denied.¹

¹ "The protection which the law supposes the infant to need, is as much required against the improvidence which has paid out as against that which only promises to pay, and where it can be afforded without converting the shield into a sword it should be given. There seems to be no good reason why, if lands conveyed and goods sold and delivered may be reclaimed by the infant, money paid should not be." — BARROWS, J., in *Robinson v. Weeks* (1868), 56 Maine, 102, p. 107. — ED.

CORPE v. OVERTON.

1833. 10 *Bingham*, 252.¹

THE plaintiff, while yet a minor, in October, 1832, signed a written agreement to enter into partnership with the defendant, a tailor; to pay him £1,000 for a share of the business; and on the 1st of January, 1833, to execute a partnership deed with the usual covenants. The plaintiff, as a deposit for the due fulfilment of this agreement on his part, paid the defendant the sum of £100, to be forfeited to the defendant in the event of the plaintiff's failure to fulfil his agreement.

The plaintiff, after making the deposit, discovered that he had been imposed upon by exaggerated representations as to the value of the defendant's business. He therefore rescinded the contract as soon as he came of age; refused to execute the partnership deed; and sued the defendant for £100, had and received by him to the plaintiff's use.

The jury found that the plaintiff had paid the deposit on a fraudulent representation in the defendant's balance sheet; and gave a verdict for the plaintiff, damages £100.

Goulburn, Serjt., obtained a rule *nisi* to set aside this verdict, and to enter a nonsuit, or proceed to a new trial, on the ground that the finding of fraud was contrary to the evidence; and that, if the transaction were *bonâ fide*, the defendant was entitled to retain the money.

Coleridge, Serjt., who showed cause, argued that, even if the transaction were *bonâ fide*, the defendant had no right to retain the money.

Goulburn, Serjt., relied on *Holmes v. Blogg*, 8 Taunton, 508, where GIBBS, C. J., quoted a *dictum* attributed to Lord MANSFIELD (in *Earl of Buckinghamshire v. Drury*, Wilmot's Notes, 226 n., s. c. 2 Eden, 72): viz. "If an infant pays money with his own hand, without a valuable consideration, he cannot get it back again."

TINDAL, C. J. I think we may arrive at a right determination of this case without impeaching the decision in *Holmes v. Blogg*, because the facts of the two cases are manifestly distinguishable. In *Holmes v. Blogg*, the infant had paid £157 as his share of the consideration for a lease of premises in which he and his partner carried on the business of shoe-making. They occupied the premises from March till June, when the infant, coming of age, dissolved the partnership, relinquished the business, and sought to recover back the money he had paid the lessor for his lease. In that case, therefore, the sum of money sought to be recovered back, as having been paid without consideration, appeared to have been paid for something available, that is, for three months' enjoyment of the premises let to him and his partner; and the plaintiff could not put the lessor again into the same situation. And though several general expressions are dropped by the chief justice in delivering his judgment, yet when he comes to apply them to the sub-

¹ Statement and arguments abridged. Portions of opinions omitted. — Ed.

ject before the court, he gives them a less extensive latitude. After referring to the opinion of Lord MANSFIELD, he goes on, "What is the point here? That an infant having paid money on a valuable consideration, and having partially enjoyed the consideration, seeks to receive it back."

The ground, therefore, of the judgment in *Holmes v. Blogg* was, that the infant had received something of value for the money he had paid, and that he could not put the defendant in the same position as before. In the present case, the plaintiff has paid to Overton £100, for which he has not received the slightest consideration. The money was paid, either with a view to a present or a future partnership. I understand it as having been paid with a view to a future partnership. In order to ensure performance of the contract, the infant paid down £100, which he was to forfeit in case of refusal to proceed. When he came of age, he declared that he had rescinded the contract; and it seems to me that he had a right to do so. From *Hill and Whittington's Case*, Dy. 104, note, to *Whywall v. Champion*, Str. 1083, it has been always held, that an infant cannot incur liability by carrying on trade. If he cannot trade, a contract to enter into trade is one which he may avoid when he comes of age. Now, when he rescinds such a contract, he has a right to rescind the whole of it; and one of the terms of the contract in question being that he should pay down £100, if we were to determine that he has a right to rescind the contract and yet not to recover the money paid in advance, the protection which the law extends to an infant might be altogether eluded by allowing the other party to retain money so paid in advance. As it is plain, therefore, that the infant had a right to rescind the contract, the only point we have to look to with reference to *Holmes v. Blogg* is, whether he had derived any intermediate advantage from it. Now the partnership was not to be entered into till January, 1833; and in the meanwhile the infant had derived no advantage whatever from the contract. The case of *Holmes v. Blogg* fails on that ground as an authority in point.

But there is another ground on which the plaintiff is entitled to recover in this action. According to the old law, as laid down in *Coke Littleton*, 172 a, an infant is not bound by any forfeiture annexed to a contract, and his obligation with a penalty, even for necessities, is absolutely void. What is this payment, in effect, but a sum handed over by way of a penalty? The principle which exempts an infant from a penalty must extend as well to a penalty enforced by handing over money in advance, as to penalties accruing on the breach of a condition; and the rule which has been obtained in this case must therefore be discharged.

[GASELEE, J., briefly concurred.]

BOSANQUET, J. . . It is, however, a general rule, that upon an entire failure of consideration, a party is entitled to recover back money paid, and it cannot be said that in this respect an infant is in a worse situation than others. Here, the infant has derived no benefit whatever from

the contract, the consideration of which has wholly failed. It has been urged, indeed, that it failed by the act of the plaintiff himself; but if the law allows him to rescind a contract from which he has derived no benefit, he must be allowed to rescind it to all intents and purposes, and, if so, for the purpose of recovering money paid without consideration. . . .

ALDERSON, J. I am of the same opinion. The parties agree in 1832 to enter into partnership in the following January, and £100 was to be paid down, to be forfeited if the plaintiff should decline to perform his contract. Before the contract is performed, one of the parties revokes it, and remits the other to the same situation as if the contract had never been made. There is no ground, therefore, on which he can claim to retain money for the purpose of enforcing the execution of a contract which the law says an infant shall not enter into. In this, the case is clearly distinguishable from *Holmes v. Blogg*. Here the infant has had no enjoyment of any advantage from the contract: in *Holmes v. Blogg* he had enjoyment, for a period, of premises demised to him; and so far was in the same situation as if he had paid for expensive clothes or other articles not necessary, and after wearing them had brought an action for the price. In such an action he could not be allowed to recover, although the tradesman, if unpaid, could not have enforced payment.

Rule discharged.

STAFFORD v. ROOF.

1827. 9 Cowen (*New York*), 626.¹

IN the Court of Errors, on error from the Supreme Court (7 Cowen, 179).

Stafford brought trover for a horse against Roof in the Mayor's Court of Albany. Stafford, when nineteen years of age, being the owner of the horse, sold him to Roof, receiving in return Roof's note in these words: "For value received, I promise to pay John Stafford fifty dollars in liquor at my bar." Some time after the sale by Stafford, Roof offered the horse for sale as his own property, but no sale was effected by him. The present action of trover was brought while Stafford was yet a minor. The counsel for Roof objected that Stafford could not avoid the sale of the horse until he came of age. This objection was overruled, and a verdict was returned for the plaintiff, Stafford. Roof brought error to the Supreme Court, who reversed the judgment on the sole ground that an infant cannot avoid his executed contract during minority.

Jacob Lansing, for plaintiff in error.

A. Taber, contra.

¹ Statement abridged. Argument omitted. — Ed.

JONES, Chancellor. [After holding that there was another ground upon which the judgment of the Supreme Court in favor of Roof should be reversed.]

But suppose the sale to be merely voidable; could the infant or his guardian avoid it before he arrived at twenty-one years of age? The general rule is, that an infant cannot avoid his contract executed by himself, and which is therefore voidable only, while he is within age. He lacks legal discretion to do the act of avoidance. But this rule must be taken with the distinction that the delay shall not work unavoidable prejudice to the infant; or the object of his privilege, which is intended for his protection, would not be answered. When applied to a sale of his property, it must be his land; a case in which he may enter and receive the profits until the power of finally avoiding shall arrive; and such was the doctrine of *Zouch v. Parsons* (3 Burr. 1794). Should the law extend the same doctrine to sales of his personal estate, it would evidently expose him to great loss in many cases; and we shall act up to the principle of protection much more effectually by allowing him to rescind while under age, though he may sometimes misjudge, and avoid a contract which is for his own benefit. The true rule, then, appears to me to be this: that where the infant can enter, and hold the subject of the sale till his legal age, he shall be incapable of avoiding till that time; but where the possession is changed, and there is no legal means to regain and hold it in the mean time, the infant, or his guardian for him, has the right to exercise the power of rescission immediately. Now the common law gives no action or other means by which the mere possession of personal property can be reclaimed, and held subject to the right of avoidance.

[Omitting opinions discussing other questions.]

By a majority vote, the judgment of the Supreme Court was

*Reversed.*¹

DEWEY, J., IN EDGERTON v. WOLF.

1856. 6 *Gray (Massachusetts)*, 453, pp. 457, 458.

DEWEY, J. . . . The remaining exception is to the ruling of the court that, if Wolf received the property of the plaintiff under a contract of sale, but afterwards voluntarily returned it to the plaintiff, intending to give up all his interest in it, and the plaintiff accepted it, such surrender would restore the title to the plaintiff, and Wolf could not afterwards lawfully retake the property and sell it. Looking at the precise state of facts as developed in this case, we have no doubt of the correctness

¹ As to whether an infant can, during minority, avoid his conveyance of *real estate*, see *Zouch v. Parsons*, *ante*, 153, p. 160. — Ed.

of the ruling. Wolf, a minor, had, as he alleged, bought the horse of the plaintiff; but the contract was that of a minor, and so voidable at his election. This he might do as well against, as with the consent of the plaintiff. The case finds that he did thus voluntarily return the horse to the plaintiff, intending to give up all his interest in the property. The case is none the worse for the plaintiff, because he assented to this act of avoidance and return of the property by Wolf. The sale, which was voidable, was thus avoided by the infant, and all the rights of the vendor reverted in him. Wolf had thus effectually availed himself of any privilege which attached to his minority, and the contract was no longer in force. With the surrender of the property to the plaintiff, intending to give up all his interest in it, he ceased to have any right over the property, and could not retake the same against the will of the plaintiff.

WELLS, J., IN CHANDLER v. SIMMONS:

1867. 97 *Mass.* 508, pp. 510, 511.

WELLS, J. . . . Two questions are presented: First, whether the deed of a minor may be avoided, after he becomes of age, by a guardian appointed over him as a spendthrift. . . .

After he is of full age, if unable to exercise his privilege, by reason of mental or legal incapacity, it seems reasonable and consistent with the nature and purpose of this right, that it should be exercised for him and in his name by the guardian who may have charge of his interests. Otherwise he might be remediless for most serious impositions, as he can do no legally valid act himself. The right may be asserted by heirs; and we cannot doubt that it may be also by a guardian appointed over his property for any cause for which adult persons are placed under guardianship.

WOODS, C. J., IN HARVEY v. BRIGGS.

1890. 68 *Mississippi*, 60, pp. 65, 66.

WOODS, C. J. . . . In discussing the effect of the conveyance of the minors, Dora and Ella Briggs, and the attempted disaffirmance, by the plaintiff, of their contract [they having died during their minority], it is asserted that the right to disaffirm is one personal to the minor, reliance being put upon a remark to that effect, on a petition for re-argument, in the case of *Alsworth v. Cordtz et al.*, in 31 *Miss.* The remark was perfectly correct, as applied to the facts of that case, in which a stranger to the minor, one not the heir or legal representative, attempted to assert this privilege of the minor for his, the stranger's,

own benefit. Very properly the court denied the stranger the privilege. But it is not to be supposed that, by the remark of the court that infancy is a personal privilege, and not to be set up by the stranger attempting to plead it in that case, it was ever designed to overturn the universally recognized right of the legal representative or heir of the infant to assert this privilege of pleading infancy. The counsel have taken the remark with too much literalness; and the position that no one but the infant can set up the privilege of minority to defeat his adversary cannot be maintained. The legal representative or heir of the infant is entitled to plead minority in avoidance of the infant's contracts, if the plea be made in good time. Here, in this case, Dora and Ella Briggs were minors when they executed the deed to Harvey, and they both died during infancy. Their sole heir, on arriving at his majority, promptly disaffirms their contract and seeks to avoid it; and this he has clearly the right to do. It is useless to dwell on this point, or to refer to authority.

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MANSFIELD v. GORDON.

1887. 144 Mass. 168.

DEVENS, J. The plaintiff is the assignee of the estate of William A. Burrell, an insolvent debtor, and, by this bill in equity, seeks to relieve a parcel of land belonging to the estate from the incumbrance of a mortgage thereon, conditioned for the payment of a promissory note of \$1,000. The note and mortgage were executed by Burrell when under age. He is now of age, and was so when the insolvency proceedings were begun. Since his majority, he has not ratified the note and mortgage; nor is it alleged that he has done any act in disaffirmance thereof.

The assignment vested in the assignee, not only "all the property of the debtor, real or personal, which he could have lawfully sold, assigned, or conveyed," including debts due him and the securities therefor, but also "all his rights of action for goods or estate, real or personal." Pub. Sts. c. 157, § 46. "By the 'right of action' mentioned in the statute," it is said by Chief Justice Shaw, in *Gardner v. Hooper*, 3 Gray, 398, 404, "the Legislature intended all valuable rights actually subsisting, whether absolute or conditional, legal or equitable, which were to be obtained by the aid of any species of judicial process."

It is the contention of the plaintiff, that, by virtue of this clause, he, as assignee, is entitled to exercise the privilege which the insolvent might have exercised on reaching his majority, and to disaffirm this

mortgage, and thus is entitled to a decree relieving the estate therefrom.

That an individual creditor cannot attach property conveyed by a debtor while a minor, the conveyance of which such debtor might have disaffirmed, and thus avail himself of the infant's privilege, is well settled. *McCarty v. Murray*, 3 Gray, 578; *Kendall v. Lawrence*, 22 Pick. 540; *Kingman v. Perkins*, 105 Mass. 111. While the rights of an assignee are not always tested by those of an individual creditor, there would seem to be no reason why larger rights in an estate conveyed by a minor are obtained by an assignee acting on behalf of all the creditors. The contracts of an infant are voidable only, and not void; and it has often been said that the right to avoid his contracts is a personal privilege of the infant only, not to be availed of by others. *Nightingale v. Withington*, 15 Mass. 272, 274; *Chandler v. Simmons*, 97 Mass. 508, 511; 1 Chit. Con. (11th Am. ed.) 222. It is said by Wilde, J., in *Austin v. Charlestown Seminary*, 8 Met. 196, 203, "Voidable acts by an infant, or matters of record done or suffered by him, can be avoided by none but himself or his privies in blood, and not by privies in estate; and this right of avoidance is not assignable." Bac. Abr. Inf. & Age, I, 6; *Whittingham's Case*, 8 Rep. 42 b, 43 a.

It is said that it is for the benefit of the debtor that the assignee should be allowed to avoid his mortgage, as the assets of the estate are thus increased. The ground upon which an infant is allowed to avoid his contract is for his personal benefit, and for protection against the improvidence which is the consequence of his youth. He may therefore avoid his contract without returning the consideration received; but it is not easy to see why his creditors, or the assignee as representing them, should have this right. It may well be that the estate of the insolvent has been augmented to that extent by the very sum of money which the minor received. The fact that the infant may rescind without returning the consideration indicates that the right is strictly a personal privilege, and that, as the rule permitting him thus to avoid his contract is established solely for his protection, so he alone can have the benefit of it.

Decree dismissing the bill affirmed.

A. Hemenway, (*A. L. Murray* with him,) for the plaintiff.

J. Willard & J. R. Churchill, for the defendant.

KEANE v. BOYCOTT.

1795. 2 *Henry Blackstone*, 511.¹

ACTION on the case for enticing the plaintiff's servant to leave his service.

A negro boy, Toney, a slave in the island of St. Vincent, about sixteen or seventeen years old, there executed an indenture by which he bound himself to serve the plaintiff, who was coming to Europe, as a servant for five years; and the plaintiff covenanted to find him food, lodging, &c. Soon after the arrival of plaintiff and his servant in England, the defendant, a captain in the army on a recruiting party, solicited the boy to enlist, and induced him to enlist. At the time of soliciting him, the captain was told by the boy that he was bound to the plaintiff for five years.

On trial, there was a verdict for plaintiff.

A rule was obtained to show cause why there should not be a new trial.

Le Blanc, Serjt., for defendant.

Adair, Serjt., *contra*.

EYRE, C. J. [The learned judge considered the suggestion, that the effect of the contract might be to emancipate the slave, and therefore that it was for the benefit of the infant: also whether a contract to serve for five years having the effect of emancipation from slavery could be considered a contract for necessities, binding on the infant "But it is not necessary," he said, "to go the whole length of the proposition, as this is not a case between the master and the servant. He then distinguished void and voidable contracts, and said that the court were not warranted to decide that the contract in question was so prejudicial to the infant as to be void. The opinion then proceeds:]

If it be a contract voidable only, the infant may affirm it: and that is sufficient to decide this case. For this is the case of a stranger and a wrong-doer interfering between the master and servant, and now seeking to take advantage of the infant's privilege of avoiding his contracts, a privilege which is personal to the infant, and which no one can exercise for him. Suppose the case of a stranger disseising the feoffee of an infant, the entry tolled, and a writ of right brought by the feoffee, should the tenant be permitted to object the infancy of the feoffor. In *Whittingham's case*, 8 Co. 42, *b*, it was holden, that a privity in law, not in blood or estate, did not entitle a third person to avoid the act of an infant. That was the case of an escheat, and several other cases are put in our books, where if the infant himself does not take advantage of infancy, no one else shall, and which are cases where the party who would take advantage of the infancy has a direct interest in the subject to which the act done by the infant has relation.

¹ Statement abridged. Part of opinion omitted. — Ed.

The defendant in this case had no concern in the relation between the plaintiff and his servant, he dissolved it officiously, and to speak of his conduct in the mildest terms, he was carried too far by his zeal for the recruiting service. If he had given himself time to reflect upon what his own feelings would have been, if he had been in the situation of the master, I am persuaded that he not only would not have solicited this negro boy to leave his master, but would not have accepted him if he had voluntarily offered to enlist at the drum head. Upon the whole, therefore, we are of opinion that the verdict is right, and that there ought not to be a new trial.

Rule discharged.

FRY, L. J., IN DE FRANCESCO v. BARNUM.

1890. *Law Reports, 45 Chancery Division*, 430, p. 443.

[By an apprenticeship deed between an infant, her parent, and the plaintiff, the infant was bound apprentice to the plaintiff for a term of years, upon certain terms. The infant, during the said term, made an engagement with Barnum; and the plaintiff brought an action against Barnum *et als.*, claiming that the infant had been enticed away from his service by Barnum, and seeking (*inter alia*) to recover damages. After intimating that the provisions of the deed were unreasonable, and that there was no valid contract between the infant and the plaintiff, the opinion proceeds:]

FRY, L. J. I hold, therefore, this instrument is one by which the infants are not bound; and consequently Mr. *Barnum*, having only enticed them away from an employment or contract of a nature which is not binding upon them, no action can be maintained against Mr. *Barnum*.

HOLMES v. RICE.

1881. 45 *Michigan*, 142.

TROVER by Sarah A. Holmes, against Rice and Dayton for the conversion of a fanning mill. Defendants pleaded in justification a judgment in favor of Rice against Lorenzo Holmes, the plaintiff's husband, and a seizure of the property by Dayton, as constable, to satisfy the execution. Plaintiff showed that the mill belonged to her minor daughter, Ella M. Parks, whose guardian she was, and who had executed to her a bill of sale of it, before suit was brought, and had also assigned her right of action. The bill of sale and assignment were excluded from evidence on objection that being an infant and under plaintiff's guar-

dianship she could not convey a title upon which action could be maintained. Plaintiff brings error. Reversed.

M. V. & R. A. Montgomery, for plaintiff in error.

J. C. Shields and *M. M. Atwood*, for defendants in error.

MARSTON, C. J. The law in recognizing the incapacity of infants to enter into certain contracts and declaring such contracts voidable does so for the infant's protection. Their contracts are not void but voidable, and it is for the infant to avoid the contract or ratify it, and not within the power of a stranger — certainly not of a wrong-doer — to set up the infant's incapacity to contract as a protection to himself. The contract, though voidable at the option of the infant, is valid as to third parties who are strangers to both parties to the contract, and not claiming under either.

The judgment must be reversed with costs and a new trial ordered.

EDMUNDS v. MISTER.

1881. 58 *Mississippi*, 766.¹

APPEAL from the Circuit Court of Grenada County.

Fitz-Gerald & Whitfield, for appellant.

R. H. Golladay, for appellees.

CHALMERS, C. J. Robert H. Edmunds, a young man of handsome estate, became of age on the 12th of July, 1859. He was already burdened with debts, contracted by him during minority, amounting to about \$2,000, and on the 19th of March, 1860, without having theretofore done anything either in affirmance or in disaffirmance of these debts, he executed and placed on record a deed whereby he conveyed the bulk of his estate, real and personal, to his infant daughter, then two months of age, for and during the term of her natural life, leaving the reversion in himself. He declared at the time that he intended by the act to defeat the holders of claims contracted during his minority, as to the estate conveyed; but that he was unwilling to plead minority, and intended to pay the debts. How he was to pay them does not appear, nor did he then declare, though he now says that he intended to do so out of his wife's estate.

Edmunds continued to become more and more involved, until his total indebtedness finally amounted to more than \$9,000. Suits were eventually brought against him by his various creditors, and in these suits no attention seems to have been paid to any distinction between his debts, as to whether they were contracted before or after majority, or before or after the date of the conveyance to the daughter. It is certain, however, that the debts contracted between his arrival at majority and the date of the conveyance (a period of eight months) were trifling.

¹ Arguments and part of opinion omitted. — Ed.

The suits all ripened into judgments, no plea of minority having been interposed in any of them. Under sales made by virtue of these judgments, defendants have held the lands now sued for, during many years. The plaintiff is the daughter of Edmunds, to whom, when she was two months old, he conveyed a life-estate in the property, and she brings this action of ejectment to recover the lands and mesne profits. The conveyance to her is older than the judgments through which defendants claim, but, being voluntary, is fraudulent and void if the holders of the demands against Edmunds for goods furnished during minority were legal creditors at the date of the conveyance. At the time the goods were furnished, Edmunds had a guardian; and in discussing the question at issue we shall assume, as indeed the law does in the absence of proof, that they were not necessities in contemplation of law, nor furnished under such circumstances as that their reception, of itself, imposed a legal liability upon him. The executory contracts of infants for the payment of money, not for necessities, impose no legal liability upon them. They furnish a sufficient consideration to support contracts thereafter made, so that if ratified in any way after majority they will be enforced; but they derive their vitality, not from the original consideration, but from the new promise or ratification. They can be ratified at common law only by an act or agreement which possesses all the ingredients necessary to a new contract, save only a new consideration. The contract made during minority will furnish the consideration, but it will furnish nothing more. All else must be supplied by the new agreement. A mere acknowledgment of the debt is not sufficient, but there must be an express promise to pay, voluntarily made; and this is true under the common-law authorities, without reference to the provisions of our statute, which declares that the new promise or ratification must be in writing. Code, 1857, p. 360, art. 8.

There cannot be said to be any contract in any legitimate sense of the term until after the act of ratification, or until after the written promise under our statute. Before ratification, it is wholly unilateral in its bearing; that is to say, the consideration has been advanced by the adult, but there is no corresponding legal liability upon the minor. It stands, not upon the footing of a debt barred by the Statute of Limitations and afterwards revived by a new promise, because in such a case there has always been an existing, unextinguished right, since limitation affects only the remedy, and not the right; but it is rather like a debt wiped out by a discharge in bankruptcy. In such case there is no existing debt, but there is an outstanding consideration which will support a new contract. This is the illustration used in *Hodges v. Hunt*, 22 Barb. 151, and in *Taft v. Sergeant*, 18 Barb. 320. It is an anomaly in pleading that the plaintiff declares upon the original contract, and to a plea of infancy replies the new promise, while all the authorities declare that the recovery is not upon the original contract, but upon the new promise; and yet undoubtedly the anomaly exists. While this is true, it is clear that if the declaration should set out the whole facts, — that

is, if it showed that the articles were furnished to a minor, that they were not necessities, and that there had been no new promise, — it would be demurrable; or if judgment by default was taken upon it, it would be reversed upon appeal. The reason is that it would show no cause of action, and it would show no cause of action because of the absence of a new promise. It is the new promise, therefore, that makes the debt, and without it there is none. Tyler on Inf. & Cov., sect. 46 *et seq.*, and authorities cited.

It follows, from these well-settled principles, that the holders of claims against Edmunds which were for articles, not necessities, furnished during minority and not ratified after majority, were not legal creditors at the date of his conveyance, and cannot predicate fraud of it, though it was voluntary.

If defendants can show that the judgments through which they hold embraced, in whole or in part, debts created after the attainment of majority, and before the date of the conveyance, or were in whole or in part for necessities furnished during minority, under circumstances which imposed a legal liability upon the infant, they can successfully resist plaintiff's demand, but the burden of doing this rests upon them; and while there is something to suggest that debts contracted after the disability of minority had ceased, and before the execution of the conveyance, may have entered into some of the judgments, this does not clearly appear. The ruling of the court below rendered any such showing upon the part of the defendants unnecessary.

The learned judge, adopting the view that minority was a personal privilege, which could not be set up by any one but the minor, and that he could only do so by pleading it when sued, excluded all testimony as to the debts having been contracted during minority; and this was at once an end of plaintiff's case.

He confounded therein the executed and the executory contracts of infants, and seems to have been partly, at least, led into this error by the course of counsel, who respectively contended, the one, that the making of the deed to the daughter was a disaffirmance of the minority debts, and the other, that it was not. But it is not a question of disaffirmance, but of affirmation. Executed contracts of infants must be disaffirmed or they will become obligatory; executory contracts must be affirmed or they will be null. Until affirmed, they impose no liability.¹ There was no pretence of affirmation here, and no act of disaffirmance was necessary.

¹ "The singular doctrine has occasionally been advanced that the executed contracts of infants are binding until avoided, but their executory contracts are invalid until affirmed. . . . This is a senseless and erroneous distinction. Executory contracts of infants are no more invalid than executed contracts. Both are binding until disaffirmed. No one would contend that infants' executory contracts could be disregarded as nullities by the adult contracting parties, or by third persons, until they had been ratified; yet this is precisely what the doctrine leads to. It may be that a ratification will result from less positive acts or conduct in case of executed contracts than in case of executory; but this does not prove that the one class has a greater binding effect than the other." Note in 18 Am. State Reports, pp. 578, 579. —ED.

True, when sued, Edmunds failed to plead minority, and judgments went against him. From the rendition of those judgments, and not until then, the claims of the creditors became valid debts against him; but he had several years before made the conveyance to his daughter, and it was not possible for him, by then making the debts valid, to affect the title previously conveyed. It is well settled that suffering judgment to go upon a debt barred by the Statute of Limitations will not affect the title to property sold before judgment, and after the bar was complete; and *a fortiori* must this be true as to minority debts, which have no binding force until judgment.

Whether the principle would apply, as to the Statute of Limitations, where the conveyance was unsupported by a valuable consideration, we have not found settled by adjudication; but certainly it must as to the unratified minority debts of an infant, since as to them there is no legal indebtedness.

Neither the research of counsel nor our own has discovered any adjudicated case similar in its facts or wholly analogous in principle to the one at bar; but we feel satisfied that the general principles controlling the liabilities of infants must lead to the conclusion here reached.

DOWNING v. STONE.

1891. 47 *Missouri Appeal*, 144.¹

— APPEAL from the Johnson Circuit Court to Kansas City Court of Appeals.

O. L. Houts, for appellant.

Samuel P. Sparks, for respondent.

GILL, J. William E. Downing, an infant, by his next friend, prosecutes this action against defendant for the conversion of a mare. The petition is in the usual form. Case was tried by the court. Plaintiff's evidence showed that on August 5, 1889, Wm. E. Downing was about nineteen and one-half years of age; that he was on that day the owner of the mare in question of value of \$100, and traded her to one Hartshorn, and received in exchange therefor, by proper conveyance, the assignment of a patent churn, vesting in Downing the exclusive right to the whole patent within certain territory described in the deed, \$45 in cash, and some orders for churns; that about six weeks afterwards Hartshorn sold the mare to the defendant Stone; that on November 20, 1889, some time after this sale, Wm. E. Downing tendered Hartshorn \$45, the order for churns, offered to reconvey to him the patent, and demanded the return of the mare from Hartshorn, who stated that he did not own her, could not return her if he desired, and refused to

¹ Arguments omitted. — ED.

accept the tender. On the same day, but afterwards, Downing demanded the mare of defendant, who was then the owner of her, but made no offer to give or deliver to defendant what had been received from Hartshorn for the mare, stating to defendant that he had made the tender to Hartshorn on that day, and that he, Hartshorn, did not accept. There was no evidence tending to show that defendant knew at the time he purchased the mare that Hartshorn had obtained her of an infant. Defendant introduced no evidence. At the close of plaintiff's evidence, defendant asked a declaration of law in the nature of a demurrer to the evidence. The court refused the declaration, and rendered judgment against defendant for the value of the mare and interest in the sum of \$105.50. Defendant filed his motion for a new trial, which being overruled, excepted and appealed to this court.

We take it as the settled law of this, if not indeed of every other, State that, where an infant seeks to avoid or rescind an executed contract of sale made by him, he must first restore all that he received on that account, if he has it. *Kerr v. Bell*, 44 Mo. 120, 125; *Highly v. Barron*, 49 Mo. 103; *Baker v. Kennett*, 54 Mo. 82; *Craig v. Van Bebbler*, 100 Mo. 583; *Betts v. Carroll*, 6 Mo. App. 518.

Hence, it was then that the plaintiff, a minor vendor, when seeking to rescind the sale and take back the mare he had sold to Hartshorn, made the effort to restore the consideration he had received. If Hartshorn had still been in possession, and the owner of the mare at the time of the tender back of the purchase price, then plaintiff's right of action as against said Hartshorn would have been complete. But we have here a new and different feature. At the time of this tender back of the consideration, demand, and attempted rescission, Hartshorn had sold and delivered the mare to defendant Stone. The question presented here, and at issue between the parties, is, whether in order to rescind the contract of sale, as made between plaintiff Downing and Hartshorn, the tender back of the consideration should be made to Hartshorn or to Stone. We are of the opinion that the tender back and notice of rescission should be made to the party with whom the infant contracted; in this instance Hartshorn, and not to Stone, a stranger to the transaction. There was between the minor Downing and Hartshorn a contract, *voidable* it is true, but still an existing contract, and it is clear that a proposition to abrogate and declare nugatory such contract should be made to the *party making* the same, and not to another and different person. A contract existing between A and B cannot be rescinded by anything said or done between A and C.

II. But to my mind there is here a more serious question than the one above alluded to. Upon the facts here stated, should plaintiff Downing be allowed any action against defendant Stone, whatever may be his right as against Hartshorn? From the evidence set out in the record, we are warranted in the assumption that Stone was a *bona fide purchaser* for value of the mare from Hartshorn; that he bought and paid for the mare without any notice of Downing's infancy, or for that

matter without any notice that Downing ever owned the mare at all, and to become such purchaser several weeks before Downing made up his mind to rescind or attempt to take the mare back. Admitting now these facts, there is much plausibility in the contention that, while the plaintiff may hold Hartshorn for the conversion of the mare, yet he ought not to be permitted to recover the animal, or her value, from this defendant, if he in good faith and for value purchased the animal before the attempted rescission. On the other hand, it may be well claimed that the sale of the mare to Hartshorn became, at the election of the infant plaintiff, as no contract, a nullity, and that the title thereto, on such election, must all the time be considered as vested in said minor, just as though no sale had occurred, and that plaintiff may follow up and recover his property from whomsoever may have the possession thereof.

A satisfactory decision of this question is attended with much difficulty. An investigation of the authorities possesses us with very few adjudications directly on this question. After a careful search, we have indeed found but one case precisely in point. In *Hill v. Anderson*, 5 Sm. & Marsh, 216, the exact question is passed on. There it appears that Anderson, a minor, sold and delivered some slaves to Exum, and Exum thereafter sold the same to Hill, who in good faith bought and paid for the slaves without notice of Anderson's minority. Upon a rescission, Anderson was allowed to recover the property from Hill, regardless of his (Hill's) entire good faith in the purchase.

Of the great number of decisions we have examined on this question, a case somewhat of kin to this is found in 6 Foster (N. H.), 280, entitled *Carr v. Clough*, and although the exact question as here in issue was not up for determination, the court there held that, "by the rescission each party is entitled to his respective property *so far as they themselves are concerned*." "It follows," also, says the opinion, "in the absence of fraud, where the contract is fully executed, that until the same is rescinded the adult has the right to the property which he has received, and has the right to make a *bona fide* sale of the same before rescission." *Carr v. Clough*, 6 Foster (N. H.), 295. In this case the situation of a purchaser from the minor's vendee is, evidently, regarded the same as that of a *bona fide* purchaser of an article from a fraudulent vendee. In that class of cases the rule is well settled, that, where one is defrauded and deceived into making a sale and delivery of personal property to another, such contract of sale is, as in case of sale by an infant, not void but voidable at the election of the misused vendor; but the vendor can only reclaim his property as against the vendee or a purchaser from such vendee with notice of the fraud. He cannot recover it, or its value, from a *bona fide* purchaser of the vendee. The recourse of the defrauded vendor is only against such vendee or those purchasing the goods from him with notice.

Now, upon a painstaking consideration of these cases, with the principles back of them, we are constrained to follow that of *Hill v. Ander-*

son, supra, and to hold, that a contract of sale of goods by an infant is voidable during his minority, and when he elects to avoid such contract and gives notice to his vendee of rescission, tendering back the consideration (if he has it), then the matter stands as though no sale had ever been made, and the infant may follow the property delivered to the vendee into whosoever's hands he may find it, and may recover the property in kind or maintain trover and conversion if the possession is denied him. It is a rule, general in its application, that if the vendor has no title neither will his vendee acquire any. There are, it is true, some exceptions to this rule. For example, that, as it appears, where a *bona fide* purchaser from the fraudulent vendee is permitted to assert an indefeasible title though the seller had one defeasible. But this exception to the rule has for its basis the principle that, where one of two innocent parties must suffer, he who had put it into the power of one to do an injury to another should suffer rather than such other who was entirely free from blame. But in case of the minor he is regarded as the special charge of the law and of the courts. He is supposed incapable of the exercise of discretion of caring for and protecting his own interest. The law will do this for and in his behalf. As is well said by the counsel in the argument of *Hill v. Anderson*: "The privilege the infant has, by law, to avoid his contracts is given for his protection; but what protection is afforded him, in reality, if his privilege is lost at the moment his property passes out of the possession of his vendee. Fraud might readily be practised on the confiding and inexperienced infant by irresponsible and insolvent purchasers, and the next moment the privilege, which the law has given for his protection, might be lost to him in a transfer of the property."

We have been unable to find any Missouri case precisely covering this question. In the case of *Craig v. Van Beber*, 100 Mo. 584, however, an infant was conceded the right to recover real estate conveyed during minority, even as against a *bona fide* purchaser from the infant's grantee. We see no reason in principle why a different rule should apply when the subject of contract is personal rather than real property. 1 Parsons on Contracts, section 322, where it is said, that this right of the infant "may be exercised against all equities of purchasers from the grantee."

It follows then that this judgment should be, and, therefore, is, affirmed.

All concur.



CHAPTER IV.

WHAT CONSTITUTES AFFIRMANCE OR DISAFFIRMANCE.

PROCTOR v. SEARS.

1862. 4 *Allen* (Massachusetts), 95.

CONTRACT on a promissory note payable to the plaintiffs, and executed by the defendant during his minority.

At the trial in the Superior Court, "the plaintiffs testified that the defendant said he would pay the note the first he paid after paying a certain mortgage; also that in a second conversation the defendant told the plaintiffs he would pay \$25 towards it, and pay the rest in instalments; also that in a third conversation the defendant said he ought not to pay all, but would pay \$25 for the note." The defendant denied that he ever promised to pay the note since his majority, but admitted that at one time he promised to pay \$25 for the note, and at another time said he would pay some part of the note rather than make any trouble, but always said he did not think he owed it. On cross-examination, the defendant testified that he had always admitted it was a debt, and that he would pay it when he could. ALLEN, C. J., instructed the jury that an acknowledgment of the debt by the defendant would not be sufficient to entitle the plaintiffs to recover, but there must be a promise to pay it; and if the promise was to pay the debt when the defendant should be able to do so, there must be proof of his ability to pay it, to entitle the plaintiffs to recover.

The jury returned a verdict for the defendant, and the plaintiffs alleged exceptions.

D. E. Ware, for the plaintiffs.

J. E. Carpenter, (*G. White* with him,) for the defendant.

METCALF, J. The right instructions were given to the jury. It has long been settled — as was said by Parker, J., in *Smith v. Mayo*, 9 Mass. 64 — that "a direct promise, when of age, is necessary to establish a contract made during minority, and that a mere acknowledgment will not have that effect." See the authorities collected in 2 Greenl. Ev. § 367, and Story on Sales, (3d ed.) 36, 37.

The testimony in the case was contradictory; and the jury must have found, under the instructions which they received, that the defend-

ant did not promise, after he came of age, to pay the note ; or, that if he did promise to pay it, or a part of it, when he should be able, the plaintiffs had not proved that he was able to pay. *Thompson v. Lay*, 4 Pick. 48. *Exceptions overruled.*¹

MORSE v. WHEELER.

1862. 4 *Allen* (Massachusetts), 570.

CONTRACT to recover the balance due on a purchase of cattle made of the plaintiffs by the defendant, who was an infant at the time of the purchase.

At the trial in the Superior Court, there was evidence tending to show that the defendant, after becoming of age, promised to pay the balance due to the plaintiffs ; and AMES, J., instructed the jury that if they believed this evidence the plaintiffs were entitled to recover. The defendant requested that this instruction might be qualified, by adding that the plaintiffs were entitled to recover, " provided the defendant knew at the time of such alleged new promise that he was not legally liable to pay the debt." The judge declined to add this qualification, but stated that, as the defendant was of full age at the time of the alleged ratification, he must be presumed to know his legal liabilities and privileges, and could not avail himself of a mistake of law on his part.

The jury returned a verdict for the plaintiffs, and the defendant alleged exceptions.

C. A. Holbrook, for the defendant.

T. L. Nelson, (*D. Foster* with him,) for the plaintiffs.

METCALF, J. This case brings before the court, for the first time, the question whether it is necessary to the ratification of an infant's promise, after he is of full age, that he should know, when he makes the new promise, that he is not legally liable on the other. It is said in numerous books that such knowledge is necessary to such ratification. But we are all of opinion that it is not necessary, either on principle or authority.

It is a long established legal principle, that he who makes a contract freely and fairly cannot be excused from performing it by reason of his

¹ "Such a ratification may be proved in divers ways; but it cannot be inferred from a mere acknowledgment of debt, as in the cases on the statute of limitations. A promise to pay is evidence of a ratification; so is a direct confirmation, though not in words amounting to a direct promise: as, if the party should say, after coming of age, *I do ratify and confirm, or do agree to pay, the debt.*" PARKER, C. J., in *Thompson v. Lay*, 1826, 4 Pickering (Massachusetts), 48, p. 49. "There need not be a precise and formal promise; but there must be a direct and express confirmation, and a substantial promise to pay the debt or fulfil the contract." WAGNER, J., in *Baker v. Kennett*, 1873, 54 Missouri, 82, p. 92. — ED.

ignorance of the law when he made it. 2 Kent Com. (6th ed.), 491, *note*; 1 Story on Eq. § 111. If, however, an exception to the application of that principle to a case like this has been authoritatively made, the defendant is entitled to the benefit of it. But we do not find that such an exception has ever been made by any judicial decision, unless it be in a case in Pennsylvania reported in 3 Barr, 428. The notion of such an exception had its origin in the opinion of Lord Alvanley, as reported in the case of Harmer v. Killing, 5 Esp. R. 102. That was an action for goods sold and delivered, to which there was a plea of infancy, and a replication of a promise after full age. The evidence was, that the defendant, after he attained full age, on payment being demanded of him, and on being threatened with an arrest, promised to give his note for the goods, but afterwards refused to give it. Lord Alvanley said that the defendant "might bind himself by a new promise after he obtained his full age, but that he held that such promise must be voluntary, and given with knowledge that he then stood discharged by law; that where an infant, under the terror of an arrest, had a promise extorted from him, or where it was given ignorant of the protection which the law afforded him, he should hold that he was not bound to it. If therefore the jury should be of opinion that the facts were that this promise was so obtained, he should direct them to find for the defendant." But, as no evidence was given, nor question made, concerning the defendant's knowledge of his rights, it is manifest that the only adjudged point in the case was, that his promise was made under duress *per minas* — threats of unlawful imprisonment — and that he might avoid it for that reason. (See *Inhabitants of Whitefield v. Longfellow*, 13 Maine, 146; 1 Parsons on Con. (3d ed.) 320.) That case was first published in 1807. And the *obiter dictum*, as well as the adjudicated point in the case, has been transferred into most of the books of a later date, English and American, which treat of the ratification of an infant's contract. Yet we have found no case in the English reports in which the question has been raised, whether it is necessary to the ratification of such contract that the new promise should be made with knowledge that the party was not legally liable on his original contract. And we find only one instance in which an English judge is reported to have expressed an opinion that such knowledge is necessary. According to the report of the case of *Mawson v. Blane*, in 26 Eng. Law & Eq. R. 560, Baron Martin said that "a ratification is an undertaking by a person after he becomes of full age, and expresses that, notwithstanding he is aware that the contract, which he entered into when an infant, is void, he nevertheless is willing to affirm it and treat it as valid." So much of this *dictum* as recognizes the necessity of a party's knowledge that he is not bound by his contract made during infancy, in order to make his new promise a legal ratification, was extrajudicial, and is not contained in his opinion in the same case, as reported in 10 Exch. 212.

In the courts of our own country, we are aware of only one case, be-

sides the present, in which counsel ever raised the question now before us. In *Taft v. Sergeant*, 18 Barb. 320, the defendant's counsel contended that his new promise was not a ratification, because there was "nothing to show that, at the time it was made, he knew that he was not liable by reason of his infancy." The decision of the court was, like the ruling at the trial of the present case — not that such knowledge was necessary, but that the defendant was "presumed to know the law."

Still, there are cases in the State courts, in which judges have cited, with apparent approval, the position advanced by Lord Alvanley — citing the case of *Harmer v. Killing*. In other cases, judges have advanced the same position, without referring to any authority. See *Smith v. Mayo*, 9 Mass. 64; *Ford v. Phillips*, 1 Pick. 203; *Thing v. Libbey*, 16 Maine, 57; *Curtin v. Patton*, 11 S. & R. 311; *Reed v. Boshears*, 4 Sneed (Tenn.), 118; *Norris v. Vance*, 3 Rich. (S. C.) 168. In no one of these cases was a decision of that point necessary, and they were all decided on other grounds. The decision, however, of the Supreme Court of Pennsylvania, in the unreasoned case of *Hinely v. Margaritz*, 3 Barr, 428, affirming the judgment of the Court of Common Pleas, seems necessarily to affirm the *obiter dictum* of Lord Alvanley, which had before been extrajudicially recognized by Duncan, J., in *Curtin v. Patton*. But, with our views of the law, already stated, we cannot adopt that decision for our guidance.

Even if it had been *adjudged*, in 5 Esp. R. 102, that knowledge of an infant's rights was necessary to the ratification of his contracts after he comes of age, such judgment would have been virtually overruled by the numerous cases decided since, in which the requisites of a ratification have been judicially stated, without mention of such knowledge. And if such knowledge be necessary to the ratification of an infant's contract, by a new promise after coming of age, why is it not necessary in those cases of ratification, not by promise, but by acts done or omitted? We see no difference in principle between the cases.

It may not be wholly useless to say, that in Selwyn's *Nisi Prius*, Roscoe on Evidence, and Addison on Contracts, the case of *Harmer v. Killing* is cited only to the point there adjudged, to wit, that a ratifying promise must be voluntary and not extorted, omitting the extrajudicial *dictum*. See also Ram on Legal Judgment, c. 5 — "Of Dicta expressed on the Bench."

Exceptions overruled.

BOYDEN v. BOYDEN.

1845. 9 Metcalf (Massachusetts), 519.

ASSUMPSIT for goods sold and delivered, and on the money counts. Writ dated March 2d, 1843. At the trial in the Court of Common Pleas, before WILLIAMS, C. J., the plaintiff gave in evidence a promissory note for \$44, given to him by the defendants on the 12th of April, 1838. The defence was infancy; and the defendants introduced evidence tending to prove that one of them was born February 9th, 1818, and the other August 11th, 1819. There was also evidence tending to prove that the said note was given for a horse and plough, bought of the plaintiff by the defendants; and that they kept the said horse and used him, about a year after buying him, and then exchanged him for another horse. There was no evidence that the defendants had disposed of the said plough, or that they, or either of them, ever offered to restore the said horse or plough to the plaintiff, or ever, in any way, gave notice of their intention to rescind and avoid their said contract.

The judge instructed the jury, that if the defendants retained the property, for which the note was given, in their own hands, and used it for their own purposes, for an unreasonable time, after arriving at the age of twenty-one years, without restoring it to the plaintiff, or giving him notice of their intention to avoid the contract, it operated as a ratification of said contract, and rendered the defendants liable in this action. The jury returned a verdict for the plaintiff, and the defendants alleged exceptions to said instructions.

This case was argued at the last September term.

H. G. Newcomb, for the defendants. A mere acknowledgment by a party, after he comes of age, of a debt contracted by him during infancy, is not a ratification. Some positive act or declaration of his, tantamount to a new contract, is necessary to defeat his power of avoiding the old one. *Rogers v. Hurd*, 4 Day, 57; *Wilcox v. Roath*, 12 Connect. 550; *Goodsell v. Myers*, 3 Wend. 479; *Whitney v. Dutch*, 14 Mass. 460; *Ford v. Phillips*, 1 Pick. 203; *Thompson v. Lay*, 4 Pick. 48; *Peirce v. Tobey*, 5 Met. 172. The mere retention, after coming of age, of the consideration for which a note was given during infancy, is not a ratification. *Benham v. Bishop*, 9 Connect. 330. See also *Roof v. Stafford*, 7 Cow. 179.

Alword, for the plaintiff [citations omitted].

SHAW, C. J. The questions as to what contracts of an infant are void, and what voidable, and, in the latter case, what shall be deemed a disaffirmance, and what a ratification, are questions which have been much discussed, and in respect to which there are conflicting authorities. It is not my intention now to review them. Some points seem to be well settled.

If a minor gives a written promise for the purchase money for goods sold to him by an adult person, the contract is voidable and not void, and may be ratified by the infant, after coming of age. *Whitney v. Dutch*, 14 Mass. 457. It is also well settled, that it is the privilege of the minor only to disaffirm the contract, and, until he does so, the other party is bound by it. The minor, when of age, may regard it as beneficial, and choose to affirm it. But if he elects to disaffirm it, he annuls it on both sides, *ab initio*, and the parties revert to the same situation as if the contract had not been made. If the minor refuses to pay the price, as he may, the contract of sale is annulled, and the goods revert in the vendor. *Badger v. Phinney*, 15 Mass. 359. But until some notice given by the purchaser, after coming of age, of his purpose to annul the contract, or some significant act done, the vendor cannot reclaim his property, and his taking of it would be a trespass. If, therefore, the minor purchaser, after coming of age, retains the specific property, treating it as his own, when it is in a condition to be restored, and it is of any value, and if, for an unreasonable time, he neglects to restore it, or to tender it, or give notice of his readiness to restore it, according to the circumstances of the property and of the parties, it manifests his determination to keep the property and affirm the contract. And further; if, after coming of age, he retains the property for his own use, or sells or otherwise disposes of it, such detention, use or disposition — which can be conscientiously done only on the assumption that the contract of sale was a valid one, and by it the property became his own — is evidence of an intention to affirm the contract, from which a ratification may be inferred. In the present case, the defendants retained the plough, one of the articles for which the note was given, between two and three years after they both came of age. Whether, if the contract had been rightfully disaffirmed, the vendor could have reclaimed the horse received by the defendants, in exchange for the one sold, after one of the defendants came of age, but not the other, we give no opinion. Retaining the plough brings the case within the principle. The court are of opinion that the directions of the judge at the trial were right, and well adapted to the case presented by the evidence. See *Boody v. McKenney*, 10 Shepley, 517.

Exceptions overruled.

EXTRACT FROM 2 GREENLEAF ON EVIDENCE, Section 367.

There is, however, a distinction between these acts and words which are necessary to ratify an executory contract, and those which are sufficient to ratify an executed contract. In the latter case, any act amounting to an explicit acknowledgment of liability will operate as a ratification; as in the case of a purchase of land or goods, if, after coming of age he continues to hold the property and treat it as his own. But in order to ratify an executory agreement made during infancy, there must be not only an acknowledgment of liability, but an express confirmation or new promise voluntarily and de-

liberately made by the infant upon his coming of age, and with knowledge that he is not legally liable. An explicit acknowledgment of indebtedness, whether in terms or by a partial payment, is not alone sufficient, for he may refuse to pay a debt which he admits to be due.

REPORTER'S NOTE TO THE CASE OF *Catlin v. Haddox*, 1882, 49 Conn. 492, pp. 500, 501.

NOTE. — The text-books and decisions make the distinction, which is remarked upon in the foregoing opinion, between the acts which are sufficient to ratify the contract of an infant where the consideration of his promise has been received by him and remains in his possession or under his control, and the acts necessary to constitute such a ratification where the fact is otherwise, and apply to the infant's contract the terms "executory" and "executed" as expressing this distinction; and one of the text-writers quoted gives as an illustration of an executed contract the case of "a purchase of land or goods," where the infant "after becoming of age continues to hold and treat the property as his own;" while another, speaking of the rule that a voidable contract of an infant cannot after his coming of age be ratified by a mere acknowledgment of the debt, says that "such at least is the rule applicable to his *executory contracts*." The court in the foregoing opinion, while noticing this distinction, does not use the same terms.

These terms are not accurately used. Where an infant gives his note for land or other property purchased, his contract is not an executed one. It is an executory contract on an executed consideration. Every contract of an infant that needs to be enforced by a suit is an executory one. An illustration of his executed contract would be his payment for the property purchased at the time of the purchase, instead of the giving of his note. Here there would be nothing to enforce against him on his becoming of age. If he should decide to avoid the contract, and attempt to recover back the money, this would be his own suit and not a suit against him; and the court would not allow him, while keeping the consideration, to recover back the money. The distinction is not therefore between the executory and the executed contracts of an infant, but between the cases where the consideration of the infant's executory contract is itself executory and those where it is executed; with the further distinction stated by the authorities between the case of an executed consideration which the infant retains and has the benefit of after becoming of age, and the case of such a consideration having passed out of his possession or control before he became of age. — R.

HUBBARD ET AL., EX'RS, v. CUMMINGS.

1820. 1 *Greenleaf* (Maine), 11.

IN a case stated for the opinion of the court, the parties agreed on the following facts:—

Jackson, the plaintiffs' testator, being seized in fee of a certain lot of land, on the 9th day of August, 1815, conveyed it to one Dudley, by

deed, with the usual covenants of warranty; and *at the same time*, as security for the purchase-money, took from Dudley a mortgage of the same land. At the time of making these deeds Dudley was a minor. Afterwards, on the 10th day of October, 1816, Dudley, being of full age, and remaining in possession of the land, for a valuable consideration conveyed it with warranty to Simeon Cummings and others; and they in like manner conveyed it to the tenant, against whom Jackson's executors brought this action to recover possession of the land as mortgaged to their testator.

Greenleaf, for the demandants [citations omitted].

Fessenden, for the tenant [citations omitted].

MELLEN, C. J., delivered the opinion of the court.

It is agreed by the counsel on both sides that the deed of a minor is not absolutely *void*, but only *voidable* at the election of the minor after his arrival at full age. This principle of law is perfectly plain, and no authorities need be cited in support of it.

But it is contended by the counsel for the tenant that the minor, after his arrival at full age, did avoid the mortgage deed made by him during his minority; and that the conveyance made by him with warranty to Cummings and others was an open and explicit disavowal and disaffirmance of the mortgage, and passed the fee of the estate to his grantees.

The counsel for the demandants, on the other hand, contends that the deed from Jackson to Dudley and the mortgage back to Jackson form but *one contract*; and that the continuance of Dudley's possession of the premises, after he became of full age, amounted to an affirmance of the whole contract, on the principle, that it must be affirmed or rescinded *in toto*; and that even the deed itself to Simeon Cummings and others may be considered as an affirmance of the first deed and mortgage.

It is said that the promissory notes which were given for the purchase-money by the minor have not been paid nor put in suit; and that perhaps no objection will ever be made by Dudley to the payment, on account of his infancy at the time of signing them. Still, the defence made in this action, and the facts on which the tenant relies, show at once on which side of the case the justice of it is to be found.

The principal question is, do the deed from Jackson to Dudley, and the mortgage to Jackson, in the circumstances under which they were executed, constitute *one contract*? If, in legal contemplation, they cannot be considered as distinct and independent contracts, but as only one contract; the application of a few acknowledged principles will lead to an easy and satisfactory decision.

The common learning with respect to a mortgage may serve to illustrate the subject. It is well known to be wholly immaterial whether the condition annexed to such a conveyance be contained in the deed of conveyance, or in another instrument under seal, and executed at the same time, as a defeasance. Both deeds form but one contract.

If A convey lands to B, in fee, to the use of C, the wife of B, shall not be endowed of these lands; for the seizin of B is only instantaneous.

Co. Lit. 31 *b*, 2 Co. 77 *a*. The seizin for an instant is where the husband, by the same act or same conveyance by which he acquires the fee, parts with it. This principle is recognized in the case of *Holbrook v. Finney*, 4 Mass. 566, and in the cases there cited; and that case goes the length of establishing the doctrine contended for by the demandants' counsel, as to the construction to be given to a deed and mortgage back to the grantor, executed at the same time. In that case the court say, "The mortgage back to the father, from the terms of it, is of the same date with the conveyance from him. They are therefore to be considered as parts of the same contract." And again — "the two instruments must be considered as parts of *one and the same contract*, between the parties, in the same manner as a deed of defeasance forms, with the deed to be defeated, but one contract, although engrossed on several sheets." We are satisfied with this decision, and the reasons on which it is founded.

In the case under consideration, the legal operation of the deed to and mortgage from Dudley, was to convey an *equity of redemption* in the premises, and nothing more. Suppose a deed had been made by Jackson to Dudley, on condition to be void if Dudley should not, on a certain day, pay him a certain sum. In both cases he might acquire the absolute estate by payment of the money according to the terms of the condition.

It was at the option of Dudley to confirm or rescind the bargain, on his arrival at full age; but he could not confirm it in part, and rescind it in part. *Kimball v. Cunningham*, 4 Mass. 502. This would be giving to the minor not only the privilege of protecting himself, but the power of injuring others, without any legal accountability. We apprehend the law is not liable to this imputation. A minor is sufficiently protected from imposition and danger, if he may, on arriving at full age, rescind his contracts, and restore to his rights the person with whom he has contracted. The case of *Badger v. Phinney* cited by the counsel for the demandants is full to this point. It is impossible not to perceive the sound sense as well as sound principles of that decision, and to feel its force when applied to the case before us. In that case the goods had been sold to a minor, who was supposed to be of full age at the time he gave his promissory notes for the value; — and avoided them by the plea of infancy. The court allowed the vendor to reclaim and hold the goods; — and they went even further; — they said that as to the goods which the minor had sold, and for which he had received payment, he could never have reclaimed them, though he had disaffirmed the contract at full age, without restoring the price of the goods to the purchaser. In other words, the contract must be rescinded *in toto*. If affirmed in *part*, it is affirmed in the *whole*.

The only question remaining, is, whether Dudley, after he became of full age, did affirm the contract made with the testator. We have seen that he continued in possession of the lands until he sold to Cummings, which was sometime after his arrival at full age; and that he claimed

to hold the lands by virtue of Jackson's deed, inasmuch as he undertook to sell and convey them with warranty. If an infant make an agreement, and receive interest upon it after he is of full age, he confirms the agreement. 1 Vern. 132. Or, if he make an exchange of land, and after he is of full age continues in possession of the land received in exchange. 2 Vern. 225. So, if he purchase lands while under age, and continues in possession after his arrival at full age, it is an affirmation of the contract. Co. Lit. 3 a; 3 Com. Dig. *Enfant*, C. 6; 2 Bulstr. 69; 2 Vent. 203; 3 Burr. 1710. On this point the authorities seem clear and decisive; — the law is plain as the fact.

The case of *Boston Bank v. Chamberlain* which was cited by the counsel for the tenant is not similar to the case now before us. In the case cited, both parties claimed under deeds from the same person; one deed being made during his minority, and the other after his arrival at full age. But it does not appear how or from whom the minor obtained his title; there was no question as to instantaneous seizin; nor the construction of two instruments as forming one contract only.

Upon a full consideration of the case, we are all of opinion that the action is maintainable upon principles of law well established; and such as will protect an honest man from injury, as well as relieve a minor from the consequences of his indiscretion, or incapacity in making contracts. This decision will do justice to the heirs or creditors of Jackson and leave the tenant to seek his indemnity upon the covenants in the deed of Dudley, or his own immediate grantors.

Let judgment be entered for the demandants as on mortgage.

HEATH v. WEST.

1853. 28 *New Hampshire*, 101.¹

TRESPASS for a horse, which the plaintiff purchased of one Dennison, paying \$75 in cash, and giving his notes, secured by a mortgage of the horse, for the balance. West defended as assignee of the mortgage to Dennison, to whom he had, at the plaintiff's request, paid the amount due thereon.

West took the horse on the mortgage, and, to close it, advertised him for sale. At the time notified, the plaintiff was present and forbid the sale, claiming the horse as his property, free from the mortgage; and getting the possession of the horse, without the consent of West, took him away. West, claiming under the mortgage, re-took the horse, and for that taking this action was brought.

On the trial the plaintiff contended that he, being a minor at the time of the execution of the mortgage, it was avoidable by him, and he thereupon would have a right to the horse; and he requested the court

¹ Statement abridged. Arguments omitted. — Ed.

to instruct the jury that by his forbidding the sale and claiming the horse as above stated, he avoided the mortgage, and thereupon had a right to the possession of the horse, and having got possession, West had no right afterwards to take him from his possession without first offering to pay him the \$75 which he paid Dennison in cash, at the purchase.

The court refused so to instruct the jury, but instructed them that the sale of the horse to the plaintiff and the mortgage from him back, being parts of the same transaction, the plaintiff, though a minor, had no right to avoid the one without avoiding the other, and could not hold the horse by the sale and yet avoid the mortgage.

Verdict for defendant. Motion for new trial.

J. W. & G. C. Williams, for plaintiff.

Burns & Fletcher, West, and Benton, for defendant.

EASTMAN, J. When this case was before this court at a previous term, it was held that the assignment of the mortgage, by Dennison to West, was good, and that West succeeded to the rights of Dennison. If, therefore, Dennison could successfully defend against the action, West can.

Where property is sold and a mortgage given back to secure the purchase money, it is in law one transaction. This is well settled in regard to real estate, and we see no reason why the doctrine should not be applied to personal property. *Roberts v. Wiggin*, 1 N. H. Rep. 73; *Robbins v. Eaton*, 10 N. H. Rep. 563; *Bigelow v. Kinney*, 3 Vt. Rep. 353; *Richardson v. Boright*, 9 Vt. Rep. 368; *Weed v. Beede & a.*, 21 Vt. Rep. 495.

Being one transaction, one part cannot be disaffirmed or rescinded, without the other being consequently disaffirmed or rescinded also. A party cannot apply to his own use that part of the transaction which may bring to him a benefit, and repudiate the other, which may not be for his interest to fulfil.

Thus it has been held that an infant cannot avoid a mortgage and affirm a deed, when both are made at one and the same time, relate to the same property, and go to make up one transaction. If the mortgage be avoided under the plea of infancy, the deed becomes of no effect. *Roberts v. Wiggin*, 1 N. H. Rep. 73; *Richardson v. Boright*, 9 Vt. Rep. 368.

Upon these principles, the ruling of the court upon the first question presented was correct. The sale of the horse to Heath, and the mortgage back, were one and the same transaction, and Heath could not avoid the mortgage without avoiding the sale.

West had the right to the property under the mortgage, so far as could be ascertained from the instrument itself, and the right to the possession of the property, and the same act on the part of Heath which would annul the mortgage would also annul the sale. By rescinding the mortgage, he thereby annulled the sale, and hence had no right to the horse by virtue of the sale.

The act of Heath in taking possession of the horse was contrary to the terms of the mortgage, and contrary to his rights, and the act of West in reclaiming it was in accordance with the mortgage. And upon the facts presented in the case, the only way in which Heath could pretend to maintain trespass against West must be by repudiating the mortgage and treating it as an act of minority and void, and at the same time hold the horse by virtue of the sale. But the repudiation of the mortgage, necessarily, upon the principles laid down, wrought out the invalidity of the sale, and the sale being made invalid, Heath could have no property in the horse, and therefore no right of action for its being taken by West.

If, as is contended by the plaintiff's counsel, this doctrine is a hardship upon the minor, inasmuch as he has paid the \$75, which are not required to be repaid as a pre-requisite to the validity of the defence, it should be borne in mind that it is not West or Dennison who is seeking to repudiate the contract, but Heath. If it were Dennison or West who was endeavoring to rescind the contract, the argument of the counsel would hold good, and the \$75 would have to be repaid.

If Heath had wished to avoid the contract and recover the \$75, he should have repudiated the whole transaction, both sale and mortgage, and demanded his money; or paid up the mortgage and then made a tender of the horse, and having done that he would be in a situation to recover all that he had paid for him. His contract was to pay \$75 cash, and give his notes, secured by a mortgage on the horse, for the balance of the purchase money; but instead of fulfilling his contract and paying the notes, he seeks by this action to hold the horse for \$75, and to repudiate the notes and mortgage. This is the effect of the whole matter, and this, neither law nor equity will permit him to do.

In *Carr v. Clough*, 6 Foster's Rep. 280, the rights of an infant were somewhat examined, and we then held, among other things, that if an infant rescinds a contract made by him for the sale of personal property, and seeks to reclaim the property or its value, he must restore, or offer to restore, the consideration received, before he can sustain an action for the property sold. By a parity of reasoning, which is fully borne out by that case, if an infant rescinds a contract for the purchase of property, and seeks to reclaim the consideration paid, he must restore the property, or offer to restore it, before he can recover the consideration.

[Remainder of opinion omitted.]

Judgment on the verdict

PROUT v. WILEY.

1873. 28 *Michigan*, 164.¹

APPEAL in chancery from Ingham Circuit.

Bill to remove a cloud from plaintiff's title to land.

In 1848, Cadwell, being then a minor, purchased the land. In 1850, Cadwell, then twenty years of age, sold and conveyed to Wallace for a valuable consideration. In 1851, Cadwell left the State, not returning until 1857. In 1850, Wallace conveyed to Skidmore. In 1853, Skidmore conveyed to Koegel, who was in possession when Cadwell returned to the State in 1857. Cadwell, in 1857, notified Koegel that he claimed the land on the ground that he was a minor when he deeded to Wallace. Koegel died at some time between 1857 and 1865. In 1865, Cadwell, being informed that the premises were vacant, authorized one H. to take possession for him; which H. did, and continued in possession until June 1, 1865, when Cadwell conveyed to L. J. Haviland, who held possession until 1867, when he conveyed to the present plaintiff. Nov. 3, 1865, while L. J. Haviland was in possession, the administrator of Koegel's estate, in pursuance of a license from the Probate Court, sold the land, or the interest of the deceased therein, to the defendant Wiley.

Other facts are stated in the opinion.

Johnson & Crane, for plaintiff.

Dart & Wiley and *Ashley Pond*, for defendant.

CHRISTIANCY, C. J. [After stating the conveyances substantially as above.] The amount of the improvement upon the land was small, being only about or a trifle over twenty acres, some of which was imperfectly cleared, and the buildings poor and of little value. Whatever of improvement there was upon the land seems to have been mostly made by Koegel, while Cadwell was absent in California and Central America, and if any were made after his return, they were made, so far as the case shows, after Koegel had received notice from Cadwell that he repudiated the deed, or did not intend to be bound by it. And there is no evidence in the case tending to show that Cadwell stood by, after his majority, when improvements were being made upon the land, without objections or notice, or that he was ever aware of any improvements going on upon the land. In our view, therefore, the case is dis-embarrassed of any question of estoppel upon this ground; and the only question in reference to the validity or effect of the minor's deed, is whether his neglect to make an actual disaffirmance of the deed, by entry or conveyance, until the time he undertook thus to disaffirm it, did, under the circumstances of this case, operate as an affirmation or confirmation of the deed executed during his minority; for, though

¹ Statement abridged from opinion. — ED.

the question has sometimes been raised whether the conveyance to another person after becoming of age, would, without entry, operate as a disaffirmance, there was here both an actual entry and a conveyance, which clearly operated as a disaffirmance, unless the delay which had previously occurred amounted to an affirmation, and cut off the right to disaffirm.

Upon this question of the affirmation of a deed executed during minority, by mere lapse of time, or in other words, by mere silence or acquiescence for any particular period of time, after the minor has attained his majority, it is sufficient, without citing and analyzing authorities, to say that, by the great weight of authority, both English and American, such delay or acquiescence, without any affirmative act indicating an intention to affirm, or tending to mislead the grantee into a belief of such intention, or any circumstances of equitable estoppel, such as standing by and seeing improvements made or money expended, or a sale of the property to another, without asserting his claim (or some such special circumstance), will not operate as an affirmation or confirmation of the deed executed during minority, nor prevent the minor from disaffirming it and reclaiming the land at any time allowed him by the statute of limitation for bringing an action. The question, in such a case, is substantially but a question of the time within which an action may be brought; and the legislature having fixed the time which to them seemed reasonable for this purpose, it is not within the power of the judiciary to change it. But when facts exist which create an equitable estoppel, as above intimated, or some other special circumstances such as are above alluded to, so that the question ceases to be one merely of the length or lapse of time, it may perhaps be very proper to hold, as many cases have held, that the infant should manifest his purpose to disaffirm within a reasonable time; and what should be held to be a reasonable time might depend much upon the special circumstances of the particular case.

This distinction reconciles nearly, though not quite all of the decisions upon this subject.

In the present case, we can discover no grounds of equitable estoppel and no such special circumstances as can properly be held to change the question from that of simple delay or lapse of time in disaffirming the deed; and we must therefore hold that Cadwell had the right to disaffirm, to re-enter upon the land and to convey to Haviland; and that the complainant therefore obtained and holds the title, and is entitled to the relief he asks to remove the cloud created by the administrator's deed to the defendant.

[The learned judge then expresses the opinion, that the plaintiff, standing in the place of Cadwell, should not be allowed by a court of equity to disaffirm the Cadwell deed and regain the property without restoring to defendant, standing in the place of Wallace, the consideration which Cadwell had received from Wallace. COOLEY and GRAVES, JJ., concur in the result upon this point on the ground that the plaintiff,

makes no objection to the allowance to the defendant of the amount of the consideration, and by implication admits its justice. CAMPBELL, J., thinks the principle inapplicable, even upon this ground, without the clear and express assent of the plaintiff, in a bill like this to quiet title.]

Decree for plaintiff, on condition that he pay, within 60 days, to the defendant the amount of said consideration.

GOODNOW v. EMPIRE LUMBER CO.

1884. 31 *Minnesota*, 468.

APPEAL by defendants from an order of the District Court for Winona County, START, J., presiding, overruling a demurrer to the complaint, the substance of which is stated in the opinion.

Thomas Wilson, for appellants.

J. M. Gilman and *W. H. Yale*, for respondents.

[Argument omitted.]

GILFILLAN, C. J. November 27, 1857, Elizabeth M. Hamilton, then a married woman and owner of certain real estate in the city of Winona, conveyed the same, her husband joining in the deed, to the defendant Huff, under whom the other defendant claims. Mrs. Hamilton was born April 21, 1842. She died December 16, 1867, and her husband died November 10, 1874. Plaintiffs are their children, Mary, born March 31, 1859, and Eugenia, January 29, 1863. They bring the action to avoid the conveyance, because of the minority of Elizabeth M. Hamilton when she executed it. Plaintiffs gave notice to the lumber company of their intent to disaffirm the conveyance, March 22, 1883. Treating this as a sufficient act of disaffirmance in case they then had the right to disaffirm, — and it is not material whether it was or not, for the bringing of the action, which was sufficient immediately followed, — there elapsed between the execution of the deed and its disaffirmance twenty-five years and four months. The disability of infancy on the part of the infant grantor ceased April 21, 1863, and, as the real estate was owned by her at the time of her marriage, her disability from coverture, so far as affected her right to reclaim, hold, and control the property, ceased August 1, 1866, when the General Statutes (1866) went into effect; so that for four years and eight months before she died, she was free of the disability of infancy, and for one year four and a half months, she was practically free of the disability of coverture. During the latter period, at least, she was capable in law to disaffirm the deed, if she had the right to do so; and if she was required to exercise the right within a reasonable time after her disability ceased, the time was running for that period. The youngest of the plaintiffs became of age January 29, 1881, so that, even if the period of minority

of plaintiffs were to be excluded (and we doubt if it should be), there is to be added at least two years and two months to the time which had elapsed when the grantor died, making the time three years and over six months.

The main question in the case is, must one who, while a minor, has conveyed real estate, disaffirm the conveyance within a reasonable time after minority ceases, or be barred? Of the decided cases the majority are to the effect that he need not (where there are no circumstances other than lapse of time and silence), and that he is not barred by mere acquiescence for a shorter period than that prescribed in the statute of limitations. The following are the principal cases so decided: *Vaughan v. Parr*, 20 Ark. 600; *Boody v. McKenney*, 23 Me. 517; *Davis v. Dudley*, 70 Me. 236; *Prout v. Wiley*, 28 Mich. 164; *Youse v. Norcum*, 12 Mo. 549; *Norcum v. Gaty*, 19 Mo. 65; *Peterson v. Laik*, 24 Mo. 541; *Baker v. Kennett*, 54 Mo. 82; *Huth v. Car. Mar. Ry. & Dock Co.*, 56 Md. 202; *Hale v. Gerrish*, 8 N. H. 374; *Jackson v. Carpenter*, 11 John. 539; *Voorhies v. Voorhies*, 24 Barb. 150; *McMurray v. McMurray*, 66 N. Y. 175; *Lessee of Drake v. Ramsay*, 5 Ohio, 252; *Cresinger v. Lessee of Welsh*, 15 Ohio, 156; *Irvine v. Irvine*, 9 Wall. 617; *Ordinary v. Wherry*, 1 Bailey, 28.


On the other hand, there are many decisions to the effect that mere acquiescence beyond a reasonable time after the minority ceases bars the right to disaffirm, of which cases the following are the principal ones: *Holmes v. Blogg*, 8 Taunt. 35; *Dublin & W. Ry. Co. v. Black*, 8 Exch. 181; *Thomasson v. Boyd*, 13 Ala. 419; *Delano v. Blake*, 11 Wend. 85; *Bostwick v. Atkins*, 3 N. Y. 53; *Chapin v. Shafer*, 49 N. Y. 407; *Jones v. Butler*, 30 Barb. 641; *Kline v. Beebe*, 6 Conn. 494; *Wallace v. Lewis*, 4 Harr. 75, 80; *Hastings v. Dollarhide*, 24 Cal. 195; *Scott v. Buchanan*, 11 Humph. 467; *Hartman v. Kendall*, 4 Ind. 403; *Bigelow v. Kinney*, 3 Vt. 353; *Richardson v. Boright*, 9 Vt. 368; *Harris v. Cannon*, 6 Ga. 382; *Cole v. Pennoyer*, 14 Ill. 158; *Black v. Hills*, 36 Ill. 376; *Robinson v. Weeks*, 56 Me. 102; *Little v. Duncan*, 9 Rich. (S. C.) Law, 55.

The rule holding certain contracts of an infant voidable (among them his conveyances of real estate) and giving him the right to affirm or disaffirm after he arrives at majority, is for the protection of minors, and so that they shall not be prejudiced by acts done or obligations incurred at a time when they are not capable of determining what is for their interest to do. For this purpose of protection the law gives them an opportunity, after they have become capable of judging for themselves, to determine whether such acts or obligations are beneficial or prejudicial to them, and whether they will abide by or avoid them. If the right to affirm or disaffirm extends beyond an adequate opportunity to so determine and to act on the result, it ceases to be a measure of protection, and becomes, in the language of the court in *Wallace v. Lewis*, "a dangerous weapon of offence, instead of a defence." For we cannot assent to the reason given in *Boody v. McKenney* (the only

reason given by any of the cases for the rule that long acquiescence is no proof of ratification), "that by his silent acquiescence he occasions no injury to other persons, and secures no benefits or new rights to himself. There is nothing to urge him as a duty to others to act speedily." The existence of such an infirmity in one's title as the right of another at his pleasure to defeat it, is necessarily prejudicial to it; and the longer it may continue, the more serious the injury. Such a right is a continual menace to the title. Holding such a menace over the title is of course an injury to the owner of it; one possessing such a right is bound in justice and fairness towards the owner of the title to determine without unnecessary delay whether he will exercise it. The right of a minor to disaffirm on coming of age, like the right to disaffirm in any other case, should be exercised with some regard to the rights of others, — with as much regard to those rights as is fairly consistent with due protection to the interests of the minor.

In every other case of a right to disaffirm, the party holding it is required, out of regard to the rights of those who may be affected by its exercise, to act upon it within a reasonable time. There is no reason for allowing greater latitude where the right exists because of infancy at the time of making the contract. A reasonable time after majority within which to act is all that is essential to the infant's protection. That ten, fifteen, or twenty years, or such other time as the law may give for bringing an action, is necessary as a matter of protection to him, is absurd. The only effect of giving more than a reasonable time is to enable the mature man, not to correct what he did amiss in his infancy, but to speculate on the events of the future — a consequence entirely foreign to the purpose of the rule, which is solely protection to the infant. Reason, justice to others, public policy (which is not subserved by cherishing defective titles), and convenience, require the right of disaffirmance to be acted upon within a reasonable time. What is a reasonable time will depend on the circumstances of each particular case, and may be either for the court or for the jury to determine. Where, as in this case, there is mere delay, with nothing to explain or excuse it, or show its necessity, it will be for the court. *Cochran v. Toher*, 14 Minn. 293 (385); *Derosia v. W. & St. P. R. Co.*, 18 Minn. 119 (133). Three years and a half, the delay in this case (excluding the period of plaintiffs' minority), after the time within which to act had commenced to run, was *prima facie* more than a reasonable time, and *prima facie* the conveyance was ratified.

Order reversed.



LESSEE OF TUCKER AND THOMPSON *v.* MORELAND.1836. 10 *Peters (U. S.)*, 58.¹

STORY, J. This is a writ of error to the Circuit Court for the county of Washington and District of Columbia.

The original action was an ejectment brought by the plaintiff in error against the defendant in error; and both parties claimed title under Richard N. Barry. At the trial of the cause upon the general issue, it was admitted, that Richard N. Barry, being seized in fee of the premises sued for, on the first day of December, 1831, executed a deed thereof to Richard Wallach. The deed, after reciting that Barry and one Bing were indebted to Tucker and Thompson in the sum of \$3.238, for which they had given their promissory note, payable in six months after date, to secure which the conveyance was to be made, conveyed the premises to Wallach, in trust to sell the same in case the debt should remain unpaid ten days after the first day of December then next. The same were accordingly sold by Wallach, for default of payment of the note, on the 23d of February, 1833, and were bought at the sale by Tucker and Thompson, who received a deed of the same, on the 7th of March of the same year. It was admitted, that after the execution of the deed of Barry to Wallach, the former continued in possession of the premises until the 8th of February, 1833, when he executed a deed, including the same and other parcels of land, to his mother, Eliza G. Moreland, the defendant, in consideration (as recited in the deed) of the sum of \$1,138.61, which he owed his mother; for the recovery of which she had instituted a suit against him, and of other sums advanced him, a particular account of which had not been kept, and of the further sum of \$5. At the time of the sale of Wallach, the defendant gave public notice of her title to the premises, and she publicly claimed the same as her absolute right. The defendant further gave evidence at the trial, to prove that at the time of the execution of the deed by Barry to Wallach, he, Barry, was an infant under twenty-one years of age; and at the time of the execution of the deed to the defendant, he was of the full age of twenty-one years.

Upon this state of the evidence, the counsel for the defendant prayed the court to instruct the jury, that if upon the whole evidence given as aforesaid to the jury, they should believe the facts to be as stated as aforesaid, then the deed from the said Wallach to the plaintiffs did not convey to the plaintiffs any title, which would enable them to sustain the action. This instruction the court gave; and this constitutes the exception now relied on by the plaintiff in error in his first bill of exceptions.

¹ Statement and arguments omitted. Only so much of the report is given as relates to a single point. — Ed.

Some criticism has been made upon the language, in which this instruction is couched. But, in substance, it raises the question, which has been so fully argued at the bar, as to the validity of the plaintiffs' title to recover; if Barry was an infant at the time of the execution of his deed to Wallach. If that deed was originally void, by reason of Barry's infancy, then the plaintiff, who must recover upon the strength of his own title, fails in that title. If, on the other hand, that deed was voidable only, and not void, and yet it has been avoided by the subsequent conveyance to the defendant by Barry; then the same conclusion follows. And these, accordingly, are the considerations, which are presented under the present instruction.

In regard to the point, whether the deed of lands by an infant is void or voidable at the common law, no inconsiderable diversity of opinion is to be found in the authorities.

[Omitting the discussion on the above point.]

It is not, however, necessary for us in this case to decide whether the present deed, either from its being a deed of bargain and sale, or from its nature, as creating a trust for a sale of the estate, or from the other circumstances of the case, is to be deemed void, or voidable only. For if it be voidable only, and has been avoided by the infant, then the same result will follow, that the plaintiff's title is gone.

Let us, then, proceed to the consideration of the other point, whether, supposing the deed to Wallach to be voidable only, it has been avoided by the subsequent deed of Barry to Mrs. Moreland. There is no doubt that an infant may avoid his act, deed, or contract, by different means, according to the nature of the act, and the circumstances of the case. He may sometimes avoid it by matter *in pais*, as in case of a feoffment by an entry, if his entry is not tolled; sometimes by plea, as when he is sued upon his bond or other contract; sometimes by suit, as when he disaffirms a contract made for the sale of his chattels, and sues for the chattels; sometimes by a writ of error, as when he has levied a fine during his nonage; sometimes by a writ of *audita querela*, as when he has acknowledged a recognizance or statute staple or merchant; sometimes, as in the case of an alienation of his estate during his nonage by a writ of entry, *dum suit infra etatem*, after his arrival of age. The general result seems to be that where the act of the infant is by matter of record, he must avoid it by some act of record (as, for instance, by a writ of error, or an *audita querela*) during his minority. But if the act of the infant is a matter *in pais*, it may be avoided by an act *in pais* of equal solemnity or notoriety; and this, according to some authorities, either during his nonage or afterwards; and according to others, at all events, after his arrival of age. In Co. Litt., 380, b, it is said, "Herein a diversity is to be observed between matters of record done or suffered by an infant, and matters *in fait*; for matters *in fait* he shall avoid either within age or at full age, as hath been said; but matters of record, as statutes, merchants, and of the staple, recognizances acknowledged by him, or a fine levied by him, recovery against

him, &c., must be avoided by him, viz. statutes, &c., by *audita querela*; and the fine and recovery by a writ of error during his minority, and the like." In short, the nature of the original act of conveyance generally governs, as to the nature of the act required to be done in the disaffirmance of it. If the latter be of as high and solemn a nature as the former, it amounts to a valid avoidance of it. We do not mean to say, that in all cases the act of disaffirmance should be of the same, or of as high and solemn a nature as the original act; for a deed may be avoided by a plea. But we mean only to say, that if the act of disaffirmance be of as high and solemn a nature, there is no ground to impeach its sufficiency. Lord Ellenborough, in *Baylis v. Dineley* (3 Maule and Selw. 481, 482), held a parol confirmation of a bond given by an infant after he came of age to be invalid; insisting that it should be by something amounting to an estoppel in law, of as high authority as the deed itself; but that the same deed might be avoided by the plea of infancy. There are cases, however, in which a confirmation may be good without being by deed; as in case of a lease by an infant, and his receiving rent after he came of age.

The question then is, whether, in the present case, the deed to Mrs. Moreland, being of as high and solemn a nature as the original deed to Wallach, is not a valid disaffirmance of it. We think it is. If it was a voidable conveyance which had passed the seizin and possession to Wallach, and he had remained in possession, it might, like a feoffment, have been avoided by an entry by an infant after he came of age. But in point of fact Barry remained in possession; and therefore he could not enter upon himself. And when he conveyed to Mrs. Moreland, being in possession, he must be deemed to assert his original interest in the land, and to pass it in the same manner as if he had entered upon the land and delivered the deed thereon, if the same had been in an adverse possession.

The cases of *Jackson v. Carpenter* (11 John. R. 539), and *Jackson v. Burchin* (14 John. R. 124), are directly in point, and proceed upon principles which are in perfect coincidence with the common law, and are entirely satisfactory. Indeed, they go farther than the circumstances of the present case require; for they dispense with an entry where the possession was out of the party when he made the second deed. In *Jackson v. Burchin* the court said, that it would seem not only upon principle but authority, that the infant can manifest his dissent in the same way and manner by which he first assented to convey. If he has given livery of seizin, he must do an act of equal notoriety to disaffirm the first act; he must enter on the land and make known his dissent. If he has conveyed by bargain and sale, then a second deed of bargain and sale will be equally solemn and notorious in disaffirmance of the first. We know of no authority or principle which contradicts this doctrine. It seems founded in good sense, and follows out the principle of notoriety of disaffirmance in the case of a feoffment by an entry; that is, by an act of equal notoriety and solemnity with the

original act. The case of *Frost v. Wolverton* (1 Strange, 94), seems to have proceeded on this principle.

Upon these grounds we are of opinion, that the deed of Barry to Mrs. Moreland was a complete disaffirmance and avoidance of his prior deed to Wallach; and consequently the instruction given by the Circuit Court was unexceptionable. To give effect to such disaffirmance, it was not necessary that the infant should first place the other party *in statu quo*.

[Remainder of opinion omitted.]

Judgment affirmed.

LANE, J., IN LESSEE OF DRAKE v. RAMSAY.

1831. 5 *Ohio*, 251, p. 253.

[ACTION of ejectment. Mrs. Drake had, while an infant, executed a deed. One question raised was: What is necessary to avoid an infant's deed?]

LANE, J. . . . Some of the books apparently suppose that the act of avoidance must be of equal solemnity with the act of grant (4 Day, 51; 14 Johnson, 124). But I cannot find it to be expressly decided, except in case of feoffments, where a peculiar feudal principle renders it necessary; we believe that an entry, suit or action, a subsequent conveyance, an effort to restore parties to their original condition, or any act unequivocally manifesting the intention, would render the avoidance effectual, and that the institution of this suit is an act fully possessing this character.

CHAPTER V.

RIGHTS REVESTING IN, OR ACCRUING TO, THE OTHER
PARTY UPON DISAFFIRMANCE BY INFANT.

BADGER v. PHINNEY.

1819. 15 *Mass.* 359.¹

REPLEVIN. Defendant pleaded property in himself as administrator of the estate of Rufus Rand.

The agreed facts were in substance as follows: In 1816, Rand, then an infant, and Bradford were co-partners in the retailing of crockery-ware. In March, 1817, they dissolved, and Bradford relinquished all interest in the stock to Rand. A few weeks later, Badger bought the stock of Rand; and continued Rand in the management of the business. Rand, at that time, stated, in answer to Badger's inquiry, that he was of full age. Rand was, in fact, born in February, 1798. In the fall of 1817, Badger sold all the remaining stock to Rand. Subsequently Badger sued Rand for the price of the goods, and attached the goods which have still later been replevied on the present writ. Rand died. His administrator pleaded infancy to Badger's action for the price. Thereupon Badger discontinued that action, gave up the attached goods to the defendant, and forthwith (after making demand) replevied on the present writ all that were left of the goods which had been sold by Badger to Rand. The defendant had included these goods in his inventory of Rand's estate, which was represented insolvent; and there were creditors, other than Badger, against whose claims the defence of infancy could not be made. Upon these facts, it was agreed that such judgment should be entered as the court should order.

Rand, for defendant. . . . The property of these goods was not in the plaintiff. He has affirmed the sale, by bringing his action for the price; and in that suit he attached these goods, as the property of the intestate. It is too late for him to avoid the contract. It is true the plea of infancy to the former suit avoided the contract, as it respected the infant, but not as respected the plaintiff. The delivery of goods to an infant has been held to be a gift. . . .

Gallison, for plaintiff.

¹ Statement and argument abridged. — Ed.

PUTNAM, J. [After deciding other questions.] We proceed to consider the second contract, made in the fall of 1817; when the plaintiff, induced by the misrepresentation of Rand that he was of age, conveyed the goods to him. The defendant contends that he has rescinded that contract, as administrator of Rand. What then? should not the plaintiff and defendant be placed in the same situation as if no such contract had been made? But that will not do for the defendant. His notion of rescinding is to keep all, and to pay nothing on the contract. He has defended successfully against the plaintiff's suit for the price of the goods, on the ground that his intestate was an infant; and he now contends that he may hold the goods also, without making any payment for them, for the same reason.

This result does not follow. The goods were delivered by the plaintiff to Rand, because he undertook to pay for them, and declared that he was of age. The basis of this contract has failed, from the fault, if not the fraud, of the infant; and on that ground, the property may be considered as never having passed from, or as having revested in, the plaintiff. It is said in Pothier, 1, 13, if, with the intention of giving or lending a thing to Peter, I give or lend it to Paul, whom I mistake for Peter, the gift or loan is void for want of my consent. The plaintiff supposed that he was dealing with a man of full age, and not with an infant; and the fraud which induced the contract furnishes the ground for the impeachment of it. Thus, in the case of *Buffington & Al. v. Gerrish & Al.*, where one purchased goods on credit, by means of false representations, and afterwards the creditors of the vendee attached them,—it was very well held that the vendor had not parted with his property, but might maintain replevin against the attaching officer.

[Remainder of opinion omitted.]

Judgment for plaintiff.

FITTS v. HALL.

1838. 9 *New Hampshire*, 441.

DEFENDANT, while an infant, falsely represented to plaintiff that he was of full age, and thereby fraudulently induced the plaintiff to sell him a lot of hats on credit. When subsequently sued for the price, defendant pleaded infancy. A replication by plaintiff was held bad; whereupon plaintiff became nonsuit, and defendant recovered judgment for costs.

Plaintiff then brought the present action. The declaration contained two counts; the first count was in case, founded upon the false and fraudulent representation as to age; the second was a count in trover for the hats.

[That part of the report which relates specially to the first count will be given *post*, in the chapter on Liability for Tort.]

Christie, for defendant. [Argument omitted.]

J. P. Hale and *James Bell*, for plaintiff. [Citations omitted.]

PARKER, C. J. [After discussing the liability of infants for torts.] The principle to be deduced from these authorities seems to be, that if the tort or fraud of an infant arises from a breach of contract, although there may have been false representations or concealment respecting the subject-matter of it, the infant cannot be charged for this breach of his promise or contract, by a change of the form of action. But if the tort is subsequent to the contract, and not a mere breach of it, but a distinct, wilful, and positive wrong of itself, then, although it may be connected with a contract, the infant is liable.

Upon this principle the count in trover, in this case, cannot be supported upon the evidence offered. The goods went into the possession of the defendant by virtue of a contract, which he has avoided by reason of his infancy. The effect of that contract was to authorize him to appropriate the goods to his own use as owner, and to dispose of them at his pleasure. If he has done so by using them, or selling them to third persons, so that he cannot re-deliver them, neither his refusal to pay, nor a refusal to deliver the goods, can be considered as anything more than a breach of contract. A refusal to pay is a breach of the express contract, and a refusal to return the goods, after he had converted them with the assent of the plaintiff, and when he no longer had it in his power to return them, could be considered as no more than a breach of an implied assumpsit to return the goods, upon request, after he had rescinded the contract by a refusal to pay. Were this otherwise, the law would furnish him no protection against his contract, in such case; for by a subsequent demand of the goods, which he had not the power to comply with, he would be made liable for their value in trover, although he could not be charged in assumpsit. It does not appear in this case that there was such a demand; but if one was made, there is no evidence that the defendant, after he denied his liability on the contract, could have complied with it.

Still less is there any ground for charging the defendant in trover, because the plaintiff was induced to make the contract, upon which he received the goods, by his misrepresentations. The goods were, notwithstanding, received upon a contract; and if the contract had not been rescinded by the defendant, upon the ground of his infancy, there would have been no pretence for an action of trover. His thus rescinding it cannot be held, of itself, to be a conversion.

If after the defendant in this case had interposed his plea of infancy, and refused to perform the contract, the plaintiff had demanded the hats, and the defendant, having them in his possession, had refused to deliver them, that would have been a wilful, positive wrong of itself, disconnected from the contract, and upon such evidence the count in trover might have been maintained. Where goods were sold to an

infant, on a credit, upon his representation that he was of full age, and a plea of infancy was interposed, an action of replevin was sustained against his administrator, after a demand upon him. 15 Mass. Rep. 359, *Badger v. Phinney*. In this latter case, the defence of infancy was made by the administrator of the infant; the demand of the goods was made upon him, and the action sustained against him; but the court said, "the basis of this contract has failed, from the fault, if not the fraud, of the infant; and on that ground the property may be considered as never having passed from, or as having revested in, the plaintiff." And upon this ground, if the infant, having rescinded his contract, withholds the goods purchased, after a demand which he had power to comply with, there seems to be no good reason why he should not answer in trover, the same as for any other conversion of property lawfully in his possession. 6 Cranch, 231; 4 B. & Pul. 140, before cited.

UTERMEHLE v. MCGREAL.

1893. 1 *Court of Appeals, District of Columbia*, 359.

MACGREAL v. TAYLOR.

1897. 167 *U. S.* 688.¹

BILL in equity, in the Supreme Court of the District of Columbia, by Mrs. Utermehle against Mrs. MacGreal and her husband, to foreclose a deed of trust upon a lot in Washington.

Mrs. MacGreal was born June 20, 1869. In 1889 she was the widow of Robert E. Moore, and was the owner of the lot subject to prior liens under deeds of trust for purchase-money. The lot was advertised for sale in 1889 under one of the trust-deeds.

Mrs. Moore had been anxious to erect a house upon the lot, which was vacant, and then owned a party-wall interest in the buildings adjoining on each side. To accomplish this purpose, as well as to prevent the sacrifice of the lot at forced sale under the purchase-money liens aforesaid, she applied to the appellant, Sarah Utermehle, for a loan of \$8,000. She represented the title as perfect, subject to the said liens and some unpaid taxes which were to be paid off, together with the necessary expenses, out of the loan, and the remainder thereof was to go to the construction of the house. Mrs. Utermehle agreed to lend the money, and on October 11, 1889, gave a check therefor to W. R. Woodward, who, as her attorney, was to examine the title and prepare the necessary papers. It was agreed by all parties that the money was to remain in Woodward's hands for disbursement, and he was first to

¹ Statement abridged from the statements in both the above reports. Only such portions of the opinions are given as relate to a single question. — ED.

take up the purchase-money notes aforesaid, and pay the necessary expenses of making the loan, including the commission to Mrs. Moore's broker, and then to pay out the remainder in accordance with the contract made by Mrs. Moore with one Myers, for the erection of the house.

On October 22, 1889, Mrs. Moore executed her note to Mrs. Utermehle for \$8,000, payable three years after date, with interest at six per cent per annum, payable quarterly, with a stipulation that default in the payment of any instalment as it became due should mature the principal. A deed of trust was also executed by Mrs. Moore to Woodward and Taylor, trustees, in the ordinary form, with power of sale in case of default, etc.

Woodward disbursed the money in strict accordance with the agreement, making his last payment March 31, 1890, at which time \$93.01 were left in his hands. On February 17, 1890, Mrs. Moore married her co-defendant, W. P. MacGreal, and as soon as the house was finished, about April 1, 1890, they moved into it, and have since made it their home.

Neither Mrs. Utermehle, nor her agents, had any knowledge at the time of the above transaction that Mrs. MacGreal was a minor; nor was the fact made known to them until about June 13, 1890. In June, 1890, immediately upon attaining her majority, Mrs. MacGreal executed an instrument formally disaffirming the deed of trust of October 22, 1889, and the note described in said deed. This disaffirmance was recorded, and a copy served upon Mrs. Utermehle and the trustees.

The lot cost originally \$4,250, and its value with the improvements on it at the time of trial was proved to be at least \$12,000.

Upon a hearing, the court below refused any relief whatsoever, and dismissed the bill. Complainant appealed to the General Term, from whence the case was transferred to the Court of Appeals.

W. R. Woodward and Edwards & Barnard, for appellant.

[Argument omitted.]

Charles A. Elliott, for appellees.

[Argument omitted.]

SHEPARD, J. [After discussing other questions.] There is yet another ground upon which the right of appellant to foreclose for the entire amount of her debt can be logically and justly maintained. All the authorities agree that where the infant has the consideration in hand at the time of the exercise of the power of disaffirmance it must be returned before the contract will be avoided in equity. Counsel for appellee do not deny this, but contend that this consideration must be on hand in specie. The contention, in other words, amounts to this: If an infant has received land or goods in exchange, he must have the same land or goods; if money, he must have the identical money.

According to this, if an infant may have made a good exchange of lands or property, and then have re-exchanged or resold them, for more property or money, at a good profit, which he has in his pos-

What if money is not returned?

session on arrival at majority, he may nevertheless disaffirm his own deed and recover the land first conveyed by him, without restitution to his vendee. Or, if he shall have received money in exchange for land at its full value, and then have invested it in other lands or in stocks or bonds worth far more at the time of disaffirmance of his deed than the land conveyed by him, he may notwithstanding repudiate his conveyance, recover his land, and make no account whatever.

The contention upon analysis appears as unsound in reason as it is vicious in morals. Courts of equity do not regard the shadow or the form, but the substance of things. They look, not at what has apparently been done, but go beneath the surface to ascertain what was actually done or intended to be done. They convert land into money and money into land in their interpretation of contracts, in the adjudication of the rights of parties founded therein, notwithstanding the conversion may stand in intention or direction only, in point of fact. They convert deeds into mortgages, and titles absolute on their face into trusts, when the proofs justify, and the interests of justice demand. They pursue trust property or funds, where the proof exists to trace them, through all the various transformations that cunning and fraud may be able to effect, and where the rights of innocent third parties have not intervened, impress them with the character of the originals.

When we look at the facts of this case, in this equitable light, it is plain to be seen that the infant defendant had, in kind, on the day of her attempted disaffirmance the very thing that she bargained for. Her object in effecting the loan was not to borrow money merely, but to extend a purchase-money lien, and to build a dwelling on the lot. She contracted at the same time for the erection of the house, and consented that the money should be held by Woodward, who, to that extent, was the agent and trustee of both parties, and disbursed by him in taking up the lien and paying for the house as its construction progressed. The money was intended and agreed to be converted into the lien and into the house. The lien still exists, though changed in form, and the house stands upon the lot affording shelter to the infant and her second husband.

It follows from what has been said that the decree appealed from must be reversed, with costs to the appellant, and the cause remanded to the court below with directions to pass a decree of foreclosure in conformity with this opinion. *Reversed.*

[A decree was made which adjudged that there was due from Mrs. MacGreal to the executrices of Mrs. Utermehle the sum of \$8,000, with interest, and costs of suit; and directed that, on default in the payment by a day named, the lot with the improvements thereon be sold and the proceeds applied in payment of such sum.]

From the above decree, the defendants appealed to the Supreme Court of the United States.

Henry E. Davis, for appellant (*W. P. Black* with him).

Job Barnard and *Wm. F. Mattingly*, for appellees (*James S. Edwards* with them).

HARLAN, J. [Omitting part of opinion.] In the present case, it is beyond question that Mrs. MacGreal's deed, made while she was a widow and an infant, was voidable, and that she disaffirmed it within a reasonable time after reaching her majority.

But does it follow that the plaintiffs are not entitled to relief on account of the money advanced by their testatrix, and which was lent to be applied and was applied in making valuable improvements upon the lot owned by the infant? If the money obtained from Mrs. Utermehle, the repayment of which was attempted to be secured by the deed of trust of October 22, 1889, had been paid directly to the infant, and, prior to the institution of this suit, had been all expended otherwise than in the improvement of her lot, the case would not be so difficult of solution; for it is well settled that it is not a condition of the disaffirmance by an infant of a contract made during infancy that he shall return the consideration received by him if, prior to such disaffirmance and during infancy, the specific thing received has been disposed of, wasted, or consumed, and cannot be returned.

If the minor, when avoiding his contract, have in his hands any of its fruits specifically, the act of avoiding the contract by which he acquired such property will divest him of all right to retain the same; and the other party may reclaim it. He cannot avoid in part only, but must make the contract wholly void if at all; so that it will no longer protect him in the retention of the consideration. *Badger v. Phinney*, 15 Mass. 359; *Bigelow v. Kinney*, 3 Vermont, 353. Or, if he retains the use or disposes of such property after becoming of age, it may be held as an affirmation of the contract by which he acquired it, and thus deprive him of the right to avoid. *Boyden v. Boyden*, 9 Met. 519; *Robbins v. Eaton*, 10 N. H. 561. But if the consideration has passed from his hands, either wasted or expended during his minority, he is not thereby to be deprived of his right or capacity to avoid his deed, any more than he is to avoid his executory contracts. And the adult who deals with him must seek the return of the consideration paid or delivered to the minor in the same modes and with the same chances of loss in the one case as in the other. *Dana v. Stearns*, 3 Cush. 372, 376. It is not necessary, in order to give effect to the disaffirmance of the deed or contract of a minor, that the other party should be placed in *statu quo*. *Tucker v. Moreland*, 10 Pet. 58, 65, 74; *Shaw v. Boyd*, 5 S. & R. 309. See also 1 Am. Lead. Cases, 5th ed. *224, *232, *249, *259; *Mustard v. Wohlford's Heirs*, 15 Gratt. 329, 340; *Cresinger v. Welch's Lessee*, 15 Ohio, 156; *Eureka Co. v. Edwards*, 71 Alabama, 248, 256; *Corey v. Burton*, 39

Michigan, 30; *Price v. Furman*, 27 Vermont, 268, 271; *Robinson v. Weeks*, 56 Maine, 102, 107; *Carpenter v. Carpenter*, 45 Indiana, 142, 146; *Harvey v. Briggs*, 68 Mississippi, 60, 66; *St. Louis, &c. Railway v. Higgins*, 44 Arkansas, 293, 297; *Reynolds v. McCurry*, 100 Illinois, 356, 359; Tyler's Infancy and Coverture, § 37, and authorities cited.

Does the present case come within the rule upon which Mrs. MacGreal relies? Under the terms of the loan, the money obtained from Mrs. Utermehle was used in lifting existing valid mortgages from her lot and in placing substantial improvements upon it; and she is in actual possession of the lot so improved and freed from the liens created by the deeds of March 8, 1886, and September 3, 1887, and subject to which she acquired the property. A court of equity will look at the real transaction, and will do justice to the adult if it can be done without disregarding or impairing the principle that allows an infant, upon arriving at majority, to disaffirm his contracts made during infancy. Mrs. MacGreal having disaffirmed her deed of October 22, 1889, she is not entitled, as between herself and the estate of Mrs. Utermehle, to be protected except in the enjoyment of such rights in the property in question as she had at the time it was incumbered by her disaffirmed deed of trust. She is not entitled to make profit out of those whose money has been used, at her request, in protecting and improving her estate. Her lot was subject to prior liens on account of the debts due to Brough and Porter as well as for taxes. Those debts have been discharged, and her property is no longer in any danger from them. The liability of her property for those debts when the deed of 1889 was executed cannot be questioned. These debts having been paid by Mrs. Utermehle, the appellees are entitled, in equity, to be subrogated to the rights of the persons who held them, and who were about to foreclose the liens therefor when the application was made to Mrs. Utermehle for the loan of \$8,000, to be used in meeting those debts and in improving the lot in question. 1 Jones on Mortgages, §§ 874, 877, and authorities cited. And within the meaning of the rule that, upon the infant's disaffirmance of his contract, the other party is entitled to recover the consideration paid by him which remains in the infant's hands or under his control, it may well be held — and gross injustice will be done in this case if it be not so held — that the money borrowed from Mrs. Utermehle is, in every just sense, in the hands of Mrs. MacGreal. To say that the consideration paid to Mrs. MacGreal for the deed of trust of 1889 is not in her hands, when the money has been put into her property in conformity with the disaffirmed contract, and notwithstanding such property is still held and enjoyed by her, is to sacrifice substance to form, and to make the privilege of infancy a sword to be used to the injury of others, although the law intends it simply as a shield to protect the infant from injustice and wrong.

But we are of opinion that the court below erred in adjudging, as, in effect, it did adjudge, that the appellees are entitled to have their *entire*

debt first paid, even if all the proceeds of sale be required for that purpose. The decree should have been so framed as to place Mrs. MacGreal, so far as it could be done, in the position occupied by her at the time the deed of trust was given; for only by such a decree can the privilege of infancy, resulting from incapacity to contract, be effectively protected. A decree giving the appellees a preference in the distribution of the proceeds of sale for their entire claim necessarily must rest upon the ground that one who obtains from an infant a deed of trust conveying his real estate to secure the repayment of money loaned to him, and to be applied, and which is applied, in improving such estate, may thereby make the disaffirmance of the infant ineffectual in every case where the property, upon being sold, does not bring more than the debt attempted to be secured. But no such result can properly happen if the court enforces the established rule that, upon the disaffirmance of a deed made during infancy, the infant is entitled to recover the property conveyed by him, and the adult to recover such of the consideration paid by him as may remain in the hands of the infant at the time of disaffirmance. As Mrs. MacGreal ought not to hold the property in its improved state without accounting, as far as possible, for the money used in protecting it from sale for existing liens, and in improving it, there must be a sale in order that justice may be done. But as the disaffirmance of her deed restores her rights in the property, a sale ought not to have the effect of depriving her of the interest she had at the time the deed of trust was executed. The decree for a sale was proper, but, upon the showing made by this record, it should direct the proceeds to be applied, first, in repaying to the appellees, with interest, the sums paid by Mrs. Utermehle in discharge of the prior liens created by the deeds of 1886 and 1887 and by the taxes then upon the property; second, in paying Mrs. MacGreal an amount equal to the value of the lot at the institution of this suit (less such prior liens and taxes) without interest on that amount, and without taking into consideration the value of the improvements placed on the lot; and, third, in paying to the appellees such of the proceeds of sale as may remain, not exceeding the balance due on the loan, with interest. This last sum would represent, so far as may be, the value of the improvements put upon the lot with Mrs. Utermehle's money. *Lynde v. McGregor*, 13 Allen, 182, 185. Any other decree will make the disaffirmance by the infant ineffectual, if the property, upon being sold, does not bring more than the debt attempted to be secured. If the property, in its improved condition, does not bring enough to pay the whole debt due the appellees, they will be without remedy for the deficiency. If any balance should remain after satisfying the above claims in the order mentioned, it will belong to Mrs. MacGreal.

The decree is reversed, and the cause remanded for further proceedings in conformity with this opinion.

The CHIEF JUSTICE and Mr. Justice BROWN are of opinion that the judgment should be affirmed.

McCARTHY v. HENDERSON.

1885. 138 *Massachusetts*, 310.¹

ACTION of contract to recover the sum of \$175 paid by the plaintiff, a minor.

Case submitted on agreed facts, in substance as follows:—

Plaintiff was born July 8, 1862. On September 22, 1882, he signed a paper called a lease, wherein he acknowledged the receipt of a barge from Henderson Brothers, and promised to pay \$50 per month for the use of it; the paper stating that when the payments amounted to \$675, the barge was to become the plaintiff's property. At the time of signing the paper, plaintiff paid defendants \$175, and the barge was delivered to him, and was used by him in his business. October 18, 1882, plaintiff notified defendants that he was a minor; and that he wanted the \$175 returned to him; offering to return the barge to defendants upon such repayment. Defendants refused to repay. The present action was commenced January 9, 1883. Plaintiff continued to use the barge until January 22, 1883, when it was taken possession of by the defendants.

L. C. Southard, for plaintiff.

J. W. O'Brien, for defendants.

MORTON, C. J. The paper, which in the statement of facts is called a lease, is merely a receipt of the plaintiff acknowledging that he had received a barge of the defendants, and stating the terms and conditions upon which he was to hold it. It shows that the transaction between the parties was a conditional sale of the barge for the price of \$675; that the sum of \$175 was paid as a part of the consideration; that the balance was to be paid by future instalments; and that, when fully paid, the barge was to become the property of the plaintiff. *Bailey v. Hervey*, 135 Mass. 172.

The contract made by the plaintiff was not a contract for necessities, nor one which was necessarily beneficial to him. He had therefore the right to avoid it at his election. *Bradford v. French*, 110 Mass. 365, and cases cited. *Gaffney v. Hayden*, 110 Mass. 137; *Chandler v. Simmons*, 97 Mass. 508.

In less than a month after the sale, the plaintiff notified the defendants of his intention to avoid the contract, and offered to return the barge to them. The defendants refused to receive it, but afterwards, at the expiration of four months from the sale, did take possession of it. The defendants have the barge, and they cannot also retain the amount paid as a part of the consideration for it. The effect of the avoidance by the plaintiff was to make the contract void *ab initio*. *Vent v. Osgood*, 19 Pick. 572. He is in the position of an infant who has paid money under a void contract and without consideration, and is

¹ Statement abridged. Argument omitted. — ED.

entitled to recover it back. In no other way can he receive the protection which the law affords him against contracts which he is deemed incapable of making by reason of his infancy.

The defendants contend that the plaintiff cannot recover the full sum paid by him; but that the defendants are entitled to deduct a reasonable compensation for the use of the barge while it was in his possession and use. It is clear that, if the plaintiff had made no advance, the defendants could not maintain an action against him for the use of the property. The contract, express or implied, to pay for such use is one he is incapable of making, and his infancy would be a bar to such suit. We cannot see how the defendants can avail themselves of and enforce, by way of recoupment, a claim which they could not enforce by a direct suit.

We are therefore of opinion that the plaintiff is entitled to recover the amount advanced by him, with interest from the date of the writ.

Judgment for the plaintiff.

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CHAPTER VI.

WHETHER OFFER TO RETURN BENEFIT RECEIVED, OR ITS EQUIVALENT, IS A CONDITION PRECEDENT TO AFFIRMATIVE ACTION BY INFANT TO RECOVER WHAT HE PARTED WITH.

BAILEY v. BARNBERGER.

1850. 11 *B. Monroe* (Kentucky), 113.

GRAHAM, J. The plaintiff had obtained from the proper department a warrant for one hundred and sixty acres of land, for his services in the United States army in the late war with Mexico. The defendant being in possession of this warrant, the plaintiff instituted this action of trover to recover its value. The proof in the case shows that on the 14th September, 1849, the plaintiff and Wiggington visited the defendant's store and proposed to sell the warrant to the defendant, who after some chaffering as to its value bought it. He paid the plaintiff \$20 in cash, and the plaintiff and Wiggington selected out of defendant's store \$100 worth of goods at fair prices. The goods were taken by Wiggington, who gave his note to plaintiff for the \$100, and (as plaintiff stated to a witness) was to give his note with security for the money. He gave his note without security, and shortly afterwards failed. At the time of this transaction, and at the commencement of this action, the plaintiff was past twenty but not quite twenty-one years of age, but had the appearance of being a man of mature age. He had for some time before the sale of his warrant been permitted by his father to work for himself and receive the pay. His father states that he had forbidden him to sell his land warrant. Upon demand made by one — as the agent of plaintiff, the defendant said he would deliver the warrant on condition of being repaid the amount which he had paid for it. This was not done, and this action was brought on the 23d October, 1849. The jury under the instructions of the court rendered a verdict for defendant, the court gave judgment and refused a new trial. From this judgment the plaintiff has appealed.

The first question to be decided, is whether the plaintiff can maintain his suit before he arrives to the age of twenty-one years. The contract is not void, but is only voidable.

Without stopping to cite the various authorities upon this subject, we content ourselves by saying that it is now the well-settled doctrine that



an infant as to his executed and voidable contracts for personal property may during his infancy exercise the power of rescission. We are next to inquire whether he can avoid his contract without returning or offering to return the money received by him, and the goods delivered to Wiggington, or if not the latter, then the note executed to him by Wiggington, or some equivalent therefor.

It is laid down as good law by Kent, and has so been decided by several courts of high authority, that if an infant avoids an executed contract, he must restore the consideration which he had received; that the privilege of infancy is to be used as a shield, and not as a sword, and he cannot have the benefit on his side of the contract without returning the equivalent on the other (2 Kent, 240; 7 Cowen, 182; Macpherson on Infants, 488; 15 Mass. Reports, 345). This rule we think is founded on strict impartial justice, and is the law of this case. Infancy may and should protect, but should not be permitted to oppress or injure others. The infant as the adult should be required to act justly. No doubt if one should take any advantage of an infant or should overreach or defraud him, he would be so guilty of wrong himself that he could not demand a restoration of the consideration received by the infant, before the latter could avoid his contract. Nor would we say that an infant of tender years, or one whose appearance indicates clearly that he is not twenty-one years of age, is embraced within the rule; all we intend to say is, that as is the fact in this case (where the plaintiff lacked but a few months of being twenty-one years of age) when a party not guilty of the slightest fraud, deceit, or imposition, has given a full and fair market value, for the property bought, and where he had from the personal appearance of Bailey, and from the fact that he had previously been acting for himself, working and receiving pay for his work, with the knowledge of, and without let or hindrance from his father, and when he had good reasons to suppose him to be a man of mature age, the plaintiff should not be permitted to recover the property or its value, without restoring the price or a fair equivalent therefor.

The cases referred to by plaintiff's counsel as sustaining the position he contends for, have been examined and are found not to be at all in conflict with the opinions herein expressed. We deem it unnecessary to cite them, or comment upon them. It will of course be understood that we do not apply this doctrine to defences by an infant, but only to the case where he is plaintiff, attempting to repudiate an executed contract.

The instructions given by the court to the jury were not inconsistent with this opinion. We do not perceive any error in the judgment of the Circuit Court. It is therefore affirmed.

Harlan, Callender, and Williams, for appellant.

Pilcher & Hauser, and Spear, for appellee.

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BARTHOLOMEW v. FINNEMORE.

1854. 17 *Barbour* (New York), 428.

THIS was an action brought before a justice of the peace to recover the value of a wagon, a promissory note for \$30, and a bank-note for \$5; which the plaintiff alleged were his property, and that the defendant had converted them to his own use. On the trial in December, 1852, it appeared that the plaintiff was twenty years of age. That in March of that year, his father "gave him his time," and he went into the blacksmith's business. In October, 1852, he bought a horse of the defendant, and paid him therefor a wagon, a note for \$30, payable to the father of the plaintiff, and signed by C. and C., and \$5. The father of the plaintiff was present at the trade, and indorsed the note of C. and C.; the defendant insisting that he should do so, and let his son have some money. After the plaintiff had kept the horse about one month, he tendered him back to the defendant and demanded the wagon, note, and money he had given in exchange for him; but the defendant refused to receive the horse or return the other property. There was proof on the part of the plaintiff tending to show that the horse was "balky" when the plaintiff took him; and on the part of the defendant, to show that the plaintiff had misused him, and that he had, in consequence, greatly depreciated in value after the plaintiff took him, and before he was tendered back. The cause was tried by a jury, who found a verdict for the defendant. The judgment was reversed by the county court of the county of St. Lawrence, and the defendant appealed.

A. B. James, for the defendant.

T. V. Russel, for the plaintiff.

HAND, P. J.

Generally a contract can be rescinded *in toto* by one of the parties, only where the other can be placed in the same situation he occupied when the contract was made. (*Chit. on Cont.* 636; *Hunt v. Silk*, 5 East, 449; *Hogan v. Weyer*, 5 Hill, 389; *Voorhees v. Eurl*, 2 id. 288; *Bradley v. Bosley*, 1 Barb. Ch. 125; *Blackburn v. Smith*, 2 Exch. R. 783; *Reed v. Blandford*, 2 Y. & J. 278; *Fitt v. Cassanet*, 4 M. & G. 898.) And if the rescission is on the ground of fraud, it must be done promptly and unreservedly. (*Masson v. Bovet*, 1 Denio, 74.) But the jury must have found the defendant had not been guilty of fraud; and also that the horse had been misused by the plaintiff, and was of less value when tendered back than at the time of the trade. There was evidence to that effect, and one witness testified that the depreciation was one half of his value. And it appears the plaintiff knew of the supposed defects of which he now complains, within a few days after he took the horse. The only question then is, whether the plaintiff,

being an infant, could rescind or avoid the contract, and recover back the property, under these circumstances.

Nearly all of the contracts of an infant, except for necessities, are voidable at his election. And the better opinion seems to be, that his executory contracts, and contracts of sale of his personal property, may be avoided during his minority. (*Stafford v. Roof*, 9 Cowen, 626; *Bool v. Mix*, 17 Wend. 132; *Corpe v. Overton*, 10 Bing. 252; *Railway Co. v. Coombe*, 3 Exch. R. 565; 5 Bac. 606; *Millard v. Hewlett*, 9 Wend. 301; *Co. Litt.* 380, a.) Though that has been doubted, where he sells chattels and delivers them with his own hand. (*Fonda v. Van Horne*, 15 Wend. 635; *Roof v. Stafford*, 7 Cowen, 179.)

But, admitting he can do this during his minority, in the case now under consideration, the contract was executed; and there are several decisions, that if an infant has executed a contract on his part, by the payment of money or delivery of property, he cannot afterwards disaffirm it and recover back the money, or claim a return of the property, without restoring to the other party the consideration received from him. (*Holmes v. Blogg*, 8 Taunt. 508; s. c. 2 Moore, 532; recognized in *Corpe v. Overton*, 10 Bing. 252; *Farr v. Sumner*, 12 Vt. R. 28; *Roof v. Stafford*, 7 Cow. 182; *Taft v. Pike*, 14 Vt. R. 405; *Chit. on Cont.* 147. And see *Medbury v. Watrous*, 7 Hill, 114, and cases there cited; 2 Kent, 240; *Badger v. Phinney*, 15 Mass. Rep. 359; *North Western R. Co. v. McMichael*, 5 Exch. R. 114, and note to American edition; *Kitchen v. Lee*, 11 Paige, 107; *Story on Cont.* § 62.) In *Newry, &c. R. Co. v. Coombe*, 5 Exch. R. 565, the infant had received no advantage whatever. It has been a question whether he can be sued for what he receives upon an executory agreement after he avoids it. (Reeves' Dom. Rel. 243 *et seq.*; *Woodworth, J.*, 7 Cow. 182.) However that may be, after he has enjoyed the benefit of it, in whole or in part, there is no equity in his avoiding his contract and reclaiming the property he delivered in exchange, without restoring the consideration; or, at least, an equivalent. This the plaintiff did not do, nor offer to do, in this case. He had the use of the horse for some time, and probably, by improper treatment, reduced him to one half of his former value; for all of which he offered no compensation.

The judgment of the county court should be reversed, and that of the justice affirmed.

Ordered accordingly.

[Fulton General Term, January 2, 1854. HAND, Cady, and C. L. ALLEN, Justices.]

CHANDLER v. SIMMONS.

1867. 97 *Massachusetts*, 508.¹

WRIT of entry by the guardian of an adult spendthrift to recover land conveyed by the ward, while a minor, for a valuable consideration.

At the trial, it appeared that the consideration paid to the ward for his deed had not been paid or tendered to the tenant. Under the rulings of the court a verdict was returned for the tenant.

E. Ames and *J. H. Dean*, for demandant.

G. Marston and *W. H. Fox*, for tenant.

WELLS, J. [After deciding other questions.] Another ground relied on by the defendant is that the deed cannot be avoided without a return of the consideration. We do not understand that such a condition is ever attached to the right of a minor to avoid his deed. If it were so, the privilege would fail to protect him when most needed. It is to guard him against the improvidence which is incident to his immaturity that this right is maintained. *Gibson v. Soper*, 6 Gray, 279-282; *Boody v. McKenney*, 23 Maine, 517. If the minor when avoiding his contract have in his hands any of its fruits specifically, the act of avoiding the contract by which he acquired such property will divest him of all right to retain the same, and the other party may reclaim it. He cannot avoid in part only, but must make the contract wholly void if at all; so that it will no longer protect him in the retention of the consideration. *Badger v. Phinney*, 15 Mass. 359; *Bigelow v. Kinney*, 3 Verm. 353. Or, if he retain and use or dispose of such property after becoming of age, it may be held as an affirmation of the contract by which he acquired it, and thus deprive him of the right to avoid. *Boyden v. Boyden*, 9 Met. 519; *Robbins v. Eaton*, 10 N. H. 561. But if the consideration has passed from his hands, either wasted or expended during his minority, he is not thereby to be deprived of his right or capacity to avoid his deed, any more than he is to avoid his executory contracts. And the adult who deals with him must seek the return of the consideration paid or delivered to the minor in the same modes and with the same chances of loss in the one case as in the other. *Dana v. Stearns*, 3 Cush. 372-376. It is not necessary, in order to give effect to the disaffirmance of the deed or contract of a minor, that the other party should be placed *in statu quo*. *Tucker v. Moreland*, 10 Pet. 65-74; *Shaw v. Boyd*, 5 S. & R. 309.

Upon the case as stated in the exceptions we are of opinion that the attempt of John E. Chandler to ratify his deed was ineffectual, and that it may be avoided now by his guardian without the previous return, or the offer to return, the consideration paid therefor. The ruling

¹ Statement abridged. Only so much of the report is here given as relates to a single point. See *ante*, p. 180. — ED.

of the Superior Court appears to have been otherwise, and therefore these exceptions must be sustained.

Exceptions sustained.

GREEN v. GREEN.

1877. 69 *New York*, 553.¹

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, affirming a judgment in favor of defendant, entered upon a decision of the court on trial without a jury. (Reported below, 7 Hun, 492.)

This was an action of trespass upon lands. The defendant among other things pleaded title. The facts found were substantially as follows :

On the 8th day of March, 1866, the defendant, being then the owner of the premises in question ; and defendant being an infant of the age of about eighteen years, in consideration of the sum of \$400.00 to him paid by the plaintiff, sold and conveyed to the plaintiff, who was his father and knew his infancy and actual age, the said premises, and thereupon [the plaintiff] entered into possession thereof and has since occupied the same. Prior to the defendant's obtaining his majority, he had wasted or otherwise ceased to possess the purchase price of said premises, and at that time was possessed of no property whatever excepting said land. On or about May 1st, 1873, the defendant re-entered upon said premises with the purpose and with notice of his intent to disaffirm the deed, and the alleged trespasses were those done in and about such re-entry.

John C. Hunt, for appellant.

Frank Hiscock, for respondent.

CHURCH, C. J. The important question in this case is whether it was necessary for the defendant to restore the consideration received for the transfer of the land to the plaintiff to entitle him to rescind the contract.

The right to repudiate is based upon the incapacity of the infant to contract, and that incapacity applies as well to the avails as to the property itself, and when the avails of the property are improvidently spent or lost by speculation or otherwise during minority, the infant should not be held responsible for an inability to restore them. To do so would operate as a serious restriction upon the right of an infant to avoid his contract, and in many cases would destroy the right altogether. A person purchasing real estate of an infant, knowing the

¹ Arguments and part of opinion omitted. — ED.

fact, and especially the father, must and ought to take the risk of the avoidance of the contract by the infant after arriving at maturity. The right to rescind is a legal right established for the protection of the infant, and to make it dependent upon performing an impossibility, which impossibility has resulted from acts which the law presumes him incapable of performing, would tend to impair the right and withdraw the protection. Both upon authority and principle we think a restoration of the consideration could not be exacted as a condition to a rescission on the part of the defendant.

Judgment affirmed.

CARPENTER v. CARPENTER, ADMR.

1873. 45 *Indiana*, 142.¹

APPEAL from the Clay Common Pleas.

Action by appellant against Peter G. Boor. Judgment below for defendant. Since the appeal, the death of Boor has been suggested, and Jacob A. Carpenter, his administrator, has been made a party appellee.

The complaint consisted of two paragraphs. The first was general, for the value of a horse sold and delivered. The second alleged, in substance, that plaintiff was an infant; that, in August, 1868, he exchanged his gelding for defendant's stallion; that in December, 1868, defendant sold the gelding, and parted with his possession; that on Dec. 11, 1868, plaintiff notified the defendant that he rescinded the trade on the ground of minority; that plaintiff then tendered the stallion to the defendant and demanded the gelding; but that defendant refused to receive the stallion. Plaintiff further alleged that he is still ready to deliver up the stallion, and he demands judgment for two hundred dollars.

To this paragraph, the defendant answered (*inter alia*) that defendant was induced to make the exchange by the false representation of the plaintiff that he was of age; that, at the time of the exchange, the stallion was of much greater value than the gelding; that, before the defendant knew that plaintiff was an infant and before any demand for rescission, defendant sold the ~~stallion~~^{gelding}, and the same was, at the time of said demand by plaintiff, entirely out of the control of the defendant, of which fact the plaintiff had full knowledge; and the defendant further says that the plaintiff, after the exchange and before the demand to rescind, purposely and intentionally, and with the intent to destroy and diminish the value of the stallion, did starve, overwork, beat and wound the stallion, so that the stallion was and is rendered wholly valueless.

¹ Statement abridged. — Ed

A demurrer for want of a statement of sufficient facts was filed to this paragraph of the answer by the plaintiff, but it was overruled, and an exception was taken.

On issue joined, there was a trial by jury, resulting in a verdict and judgment for the defendant, a motion for a new trial on behalf of the plaintiff having been made and overruled, and exception taken.

The court gave to the jury the following instruction, to which the plaintiff excepted :

“ Where a minor and an adult exchange property, and the adult acts in good faith and deals fairly with the minor in all respects, then the minor, if still in the possession of the property received of the adult, before he can recover of the adult the property the adult received of him, or its value, must return or offer to return the property received by him in as good condition as it was at the time he received the same, the unavoidable and natural decay and depreciation of the same excepted.”

The correctness of this instruction and of the ruling upon the demurrer to the paragraph of the answer set out are questioned by the assignment of error.

W. W. Carter, S. D. Coffee, and A. T. Rose, for appellant.

WORDEN, J. [After stating the case.] The paragraph of the answer set out was bad, and the demurrer should have been sustained.

The contracts of infants, except those for necessities, are void or voidable; and those in relation to personal property may be avoided by him during his minority. The false representation by the plaintiff, as alleged, that he was of full age, does not make the contract valid, nor does it estop the plaintiff to set up his infancy in avoidance of the contract; although it may furnish ground of an action against him for the tort. 1 Parsons Con. 317; 2 Kent Com., 12th ed. 241. See also, as to representations made by infants and married women, *Keen v. Coleman*, 39 Penn. St. 299. With regard to the injury done by the plaintiff to the stallion, as alleged in the pleading, it can have no influence in the case, unless the plaintiff, before he could maintain his action, was bound to tender the animal to the defendant, in as good condition as he received him, unavoidable and natural decay and depreciation excepted, as charged by the court. But we have concluded, upon looking into the question, that the plaintiff was not bound to make any tender of the stallion at all before he could maintain his action. Upon the avoidance of the contract by the plaintiff, the case stood as if none had been made, and his right to the possession of his gelding or the value of him became at once complete and perfect. Upon the avoidance of the contract, the plaintiff still having the stallion, the defendant became without doubt entitled to him, whatever condition he might be in, but it does not follow that the plaintiff was bound to make a tender of him before bringing his action. If the stallion received injury while in the possession of the plaintiff, the remedy of the defendant therefor, if the law furnishes any remedy, is an action for the tort.

Says Mr. Parsons: "If, during infancy, he has destroyed or parted with the property he purchased before a demand was made upon him for it subsequently to his disaffirmance, the seller, as we have said, may be remediless; unless, possibly, he does it in such a way, or under such circumstances, as to amount to a tort; but if he destroys or disposes of the property after coming of age, this must be regarded as a confirmation of the contract." 1 Parsons Con. 321.

There can be no difference in principle between this case, so far as the obligations of the plaintiff to make a tender is concerned, and the case of the sale of land by an infant. In such case, it has been held several times in this State, that after coming of age he may disaffirm the contract, and recover the land without tendering back the purchase-money. *Pitcher v. Laycock*, 7 Ind. 398; *Miles v. Lingerman*, 24 Ind. 385.¹ See also *Briggs v. McCabe*, 27 Ind. 327. [The learned judge here quoted at length from the opinion in *Chandler v. Simmons*, ante, p. 228.]

For these reasons, we are of opinion that the demurrer to the sixth paragraph of the answer should have been sustained, and that the instruction given was erroneous.

The judgment below is reversed, with costs, and the cause remanded, for further proceedings in accordance with this opinion.²

HAWES v. BURLINGTON, &c., R. CO.

1884. 64 Iowa, 315.³

ACTION by a minor to recover damages alleged to have been caused by the negligence of defendant. Defendant pleaded, (1) a general denial; (2) contributory negligence of plaintiff; (3) a release of the damages sustained. To the third plea, the plaintiff replied that the release had been obtained by fraud. Trial by jury. Verdict and judgment for plaintiff. Defendant appealed.

J. & L. K. Tracy, for appellant.

J. B. Young, for appellee.

SEEVERS, J. . . . III. There was evidence tending to show that the plaintiff was a minor, and that he executed the release in consideration of \$40 paid him by the defendant, and that he did not have the money

¹ In *Pitcher v. Laycock* and *Miles v. Lingerman* it does not distinctly appear whether the infant had spent the purchase-money during infancy, or whether he still had it at the time he attempted to disaffirm. In *Briggs v. McCabe* the thing sold by the infant was not land, but a non-negotiable promissory note. — Ed.

² For Indiana statutes prohibiting an infant, in certain cases, from disaffirming sales of land, unless he or she shall first restore to the owner of the estate so sold the consideration which the infant received; see 2 Revised Statutes of Indiana, edition of 1888, sections 2944, 2945. — Ed.

³ Only so much of the report is given as relates to a single point. — Ed.

so paid in his possession or under his control. The court, in substance, instructed the jury that the plaintiff could not recover unless he tendered to the defendant such money, if he had it under his control. *Judson* This instruction, it is said, does not require the plaintiff to make the tender unless he had under his control the identical money received by him; and we think this is so. It is provided by statute that a minor is bound by his contracts, unless he disaffirms the contract "and restores to the other party all money or property received by him by virtue of his contract, and remaining within his control at any time after he has attained his majority." Code, § 2238.

The contention of the appellant is that the words, "remaining under his control," should be construed as referring alone to property, the argument being that money is the representative of the value of all property, and that the same amount of money is and must be the equivalent of the money received by the plaintiff, and therefore it is not necessary that the plaintiff should have under his control and tender the particular coin or bill which he had received. The argument concedes that the identical property must be tendered, and in *Jenkins v. Jenkins*, 12 Iowa, 195, it is said: "It is not shown or pretended that he had remaining under his control at any time after attaining his majority any money or property received by him by virtue of the contract, and it is only such money or property as may thus remain that he is bound to restore." We are unable to say whether it was money or property which was received in that case. It is assumed that it was one or the other, and it is clearly held that it makes no difference which; and under the statute it is difficult to say that one rule applies when money is received, and a different rule when property is received. No such distinction is made by statute. We therefore cannot make one by construction, when there is not the slightest ambiguity in the statute. Besides this, we are bound by the case above cited.

[On account of erroneous rulings upon other points, the judgment was reversed.]

EUREKA CO. v. EDWARDS.

1881. 71 *Alabama*, 248.¹

BILL in equity by Eureka Company against Edwards *et als.* praying that the deed of June 12, 1869, hereinafter described, be cancelled as a cloud upon complainant's title.

On June 12, 1869, certain land was owned by Joseph C. Burgin and Ann Judson Thrasher; both being then minors. On that day, a deed

¹ Statement abridged from reporter's statement and the opinion. Arguments omitted. — ED.

was executed by several grantors, including said minors, purporting to convey to Edwards *et als.* certain mineral rights in said land. Of the purchase money paid for this deed — \$1,100 — only \$100 each was received by said Joseph and Ann; and they each used and expended said money before they severally reached the age of twenty-one years.

Joseph and Ann, after attaining their majority, refused to ratify the deed to Edwards, and executed deeds to other parties. The Eureka Co. now has the title conveyed by those deeds. The grantees in those deeds and the Eureka Co., at the date of their respective purchases, had notice of the existence of the prior deed to Edwards *et als.* At the time of filing the present bill, the Eureka Co. was in possession.

The foregoing facts were substantially alleged in the bill, and were established by the evidence.

On the hearing, the Chancellor denied relief to the complainants, and granted an injunction prayed for by Edwards *et als.* in a cross bill.

A. C. Hargrove, and *Watts & Sons*, for appellant.

J. M. Martin, *contra*.

STONE, J. [After deciding other points, and recapitulating the facts.]

It is thus shown that appellant — complainant below — stands in the shoes, and can assert only the rights which Joseph C. Burgin and Ann Judson Thrasher could originally assert. Appellee contends that if the complainant has made a good case on all the points noted above, the contract of sale to Edwards and associates can be disaffirmed and set aside, only on condition that the money paid by them for the mineral rights is either paid or tendered to them; and that inasmuch as the present bill seeks affirmative relief against their prior purchase, the bill should tender to them the \$1,100 they paid, and interest upon it. The defence further claims that, if mistaken in the amount the complainant should have offered to pay, the bill should at least have offered to refund the \$200 received by Joseph C. and Ann Judson, and interest upon it.

A distinction is taken in the books between executory and executed contracts made by infants. In the former class of cases, if the infant on becoming of age disaffirms the contract, then the adult purchaser or contractor will be forced to become the actor, to have the contract performed. In such case the infant, or *quondam* infant, is under no conditions or limitations in asserting the invalidity of the contract. Being voidable, and he making timely election to avoid by pleading his minority, his defence, if sustained by proof, will prevail. He need not tender back any thing he may have acquired or received under the contract. The most that can be required of him is, that if he retained and held all or any part of what he had received under the contract until he reached the age of twenty-one, then, on demand or suit, he can be held to account for it. The rule is different when the contract has been executed. Then the *quondam* infant, or any one asserting claim in his right, must become the actor; and coming into court in quest of equity, he must do, or offer to do equity, as a condition on which relief will be

decreed to him. This is the difference between asking and resisting relief. *Roof v. Stafford*, 7 Cow. 179; *Hillyer v. Bennett*, 3 Edw. Ch. 222; *Bartholomew v. Finnemore*, 17 Barb. 428; *Smith v. Evans*, 5 Humph. 70; *Mustard v. Wohlford*, 15 Grat. 329; *Bedinger v. Wharton*, 27 Grat. 857. But it is only in equity this principle obtains. If the suit be at law, the tender need not ordinarily be made, as a condition of recovering the property. But if the suit be in equity, and if the money or other valuable thing be still *in esse*, and in possession of the party seeking the relief, or in him from whom the right to sue is derived, the bill, to be sufficient, must tender, or offer to produce or pay, as the case may be. Not so, if the infant has used or consumed it during his minority. *Badger v. Phinney*, 15 Mass. 359; *Price v. Furman*, 27 Verm. 268; *Chandler v. Simmons*, 97 Mass. 508; *Walsh v. Young*, 110 Mass. 396; *Green v. Green*, 69 N. Y. 553; *Dill v. Bowen*, 54 Ind. 204; *Phillips v. Green*, 5 T. B. Monroe, 344; *Goodman v. Winter*, 64 Ala. 410; *Roberts v. Wiggin*, 1 N. H. 73.

We have examined *Martin v. Martin*, 35 Ala. 560, and think the first principle stated in the opinion is not supported by the authorities cited, or by principle.

The bill in the present case avers, and the proof sustains it, that the money received by Joseph C. and Ann Judson in the sale to Edwards, had been consumed and disposed of by them while they were minors. This relieved complainant of the duty of tendering, or offering to pay. If it did not, then the offer in the present bill would be insufficient. The offer is "to do equity, and to abide by and perform such things as, under equity and good conscience, may seem meet to entitle it to a decree for the cancellation of said deed." The offer should have been to refund the money, with interest. There was, however, no demurrer to the bill. Under no circumstances, would it be necessary for Joseph C. and Ann Judson to repay the money which had been paid to the other Burgins.

There is nothing in the argument that McDougal, Salmons and the Eureka Company had notice of the prior conveyance to Edwards. That conveyance conferred a legal title, or it conferred nothing. It is only when there is a prior right, legal or equitable, that notice, actual or constructive, becomes material, to intercept or dominate an after acquired title. The disaffirmance of the sale made by the infants to Edwards, destroyed all his claim, both legal and equitable, which their deed had vested in him, and left in him no pretence of any equity, to assert against a later purchaser with notice.

The decree of the chancellor is reversed, and the cause remanded, that the complainant may have the relief prayed by its bill. It should be borne in mind that the deed to Edwards and associates can be cancelled only as to Joseph C. and Ann Judson. The grantees are entitled to the custody and ownership of their deed, as against the other grantors. The deed should not, on its face, be marred or mutilated.

CHAPTER VII.

VARIOUS CLASSES OF ACTS, TRANSFERS, AND CONTRACTS,
WHERE INFANT'S LIABILITY IS SOMETIMES HELD TO BE
MORE EXTENDED, OR HIS RIGHT OF DISAFFIRMANCE
MORE RESTRICTED, THAN IN ORDINARY TRANSACTIONS.

[It has been doubted whether the cases here collected under this head should not have been "scattered up and down" the preceding chapters, (II. to VI.). But the present arrangement of topics, however objectionable in a text-book, has been found to work well in the discussions of the class-room. For several years lists of cases have been given out for study upon the leading subjects now included in this volume. A large proportion of the cases here collected are to be found upon those lists; and, with the exception mentioned in the next paragraph, the arrangement of topics in the last list under the head of "Infant" is very similar to that adopted in the present volume.

It may also be doubted whether the cases in the next chapter on "Liability for Necessaries," should not have been inserted by way of an additional section under the present chapter (VII.); or, if placed in a separate chapter, should not have preceded the cases on the general subject of "Contracts of Infants." Here, the present volume departs from the order of topics adopted in the lists. — Ed.]

SECTION I.

*Contracts for Services of Infant.*¹

CLEMENTS v. LONDON & NORTH WESTERN R. CO.

1894. *Law Reports* (1894), 2 *Queen's Bench*, 482.²

APPEAL from the judgment of a Divisional Court dismissing an appeal from a County Court.

The action was brought to recover damages for injuries which happened to the plaintiff while in the employment of the defendants. The

¹ No attempt has been made in this volume to deal with the statutory enlargement of an infant's rights or duties. The Legislature can remove disabilities which the common law imposes upon infants (see STORY, J., in *U. S. v. Bainbridge*, 1 Mason, 71, p. 83); and can, on the other hand, impose upon infants obligations which would not have rested upon them at common law. Even if infants are not specifically named, still the subject-matter of the statute may be such as to justify the inference that the

² Statement abridged. Arguments and portions of opinions omitted. — Ed.

plaintiff entered the service of the company as porter while under age, and at the time of the happening of the accident, and at the time of the action, which was brought by his next friend, he was still under age. The defence to the action was that the plaintiff had entered into a contract, which was binding on him, not to sue the company in case of any accident happening to him, and the question was whether he was bound by that contract.

It appeared that an insurance society existed among the employ  s of the railway company to provide, as stated in rule 3 of the rules of the society, pecuniary relief in cases of temporary or permanent disablement, arising from accident occurring while in the discharge of duty, and also in all cases of death.

The plaintiff became a member of this insurance society, agreeing to be bound by its rules, and authorizing a deduction of 2*d.* per week from his wages to be contributed to the funds of the society. The R. R. Co. agreed to contribute largely to the society funds. The plaintiff agreed to accept such contribution and any advantages to which he may be entitled under the rules of said society in satisfaction and in lieu of any claims which he or his representatives might or would otherwise have had under or by reason of the provisions of the Employers' Liability Act of 1880.

The rules provided for a payment of £80 in case of death or permanent disability arising from accident while in the discharge of duty; and also provided for weekly allowances (not exceeding a stated *maximum*) in case of temporary disablement by accident whilst in the discharge of duty. By rule 34: "If in the opinion of the committee the accident is caused wilfully, or by gross negligence on the part of the insured, the insurance hereby effected may, as respects any claim arising out of that accident, be disallowed." The rules contained provisions for forfeiture of benefits if notice of the accident were not given within a specified time; and also provisions for forfeiture of claims for

Legislature intended it to apply to them as well as to adults (see *Chesterfield v. Hart*, Smith's N. H. Reports, 350, pp. 352-354).

How far disabilities are removed, or obligations imposed, by any particular statute, must of course depend on the terms and the subject-matter of the Act. The change may be total, or only partial. For example, contracts of apprenticeship, executed in conformity with a statute, are, in a general sense, valid; and have the effect to create a legal *status*, enforceable in various ways. Yet it has been held, under certain of these statutes, that the master cannot maintain an action against the apprentice for breach of contract (see Metcalf on Contracts, 66). It is, however, perfectly competent for the Legislature to give more complete effect to contracts of service. Thus, "The Employers and Workmen Act, 1875," Statutes 38 & 39 Victoria, Chapter 90, applies to workmen in certain occupations, "whether under the age of twenty-one years or above that age." This Act authorizes the courts to award damages against workmen for breach of contract. (For a suit against an infant under this provision, see *Leslie v. Fitzpatrick*, 1877, L. R. 3 Qu. B. Div. 229.) The Act also contains provisions as to disputes between a master and an apprentice. It authorizes the court to "make an order directing the apprentice to perform his duties under the apprenticeship"; and if the apprentice fails to comply, the court may "order him to be imprisoned for a period not exceeding fourteen days." —ED.

various breaches of the regulations, or in case of criminal misconduct. By rule 46 disputes were to be settled by arbitration.

The plaintiff met with an accident while in the R. R. Company's service. From the date of the accident up to the time of bringing the present action, he received allowances from the insurance society.

The County Court judge held that the plaintiff's agreement not to sue the company was binding on him, and entered a nonsuit. On appeal to a Divisional Court (MATHEW and COLLINS, JJ.) the judgment of the County Court was affirmed. 70 L. T. N. S. 531.

Minton Senhouse, for plaintiff.

Shearman, for defendant.

Cur. adv. vult.

LORD ESHER, M. R. [After stating the claims of the parties.] At the time when the plaintiff entered into this contract he was an infant, and he was still an infant at the time of the accident, and at the time of action brought. He received under that contract payment in accordance with its terms, and without having to shew how the accident arose; but subsequently he brought this action. It is said that the receipt of that money is not to be taken into account, so that what he is claiming is to keep that money, and further to recover full compensation in respect of the injury that had happened to him, as if there were no such contract in existence, and as if he had received no compensation or advantage under it.

That raises this question of law — whether this is a contract which he can now repudiate, he being still an infant. I am of opinion, without going again through the cases that have been cited, that the answer to this proposition depends on whether, on the true construction of the contract as a whole, it was for his advantage. If it was not so, he can repudiate it; but if it was for his advantage, it was not a voidable contract, but one binding on him, which he had no right to repudiate.

It is for the court under these circumstances to say what is the construction of the contract, and after it has been construed to say whether it is clearly and manifestly for the benefit of the infant. About the construction there can be no doubt; so the question is whether this court ought to say with the County Court and the Divisional Court that this contract was for the benefit of the infant, or to take the opposite view. A court of law would know perhaps better than a jury could what advantages the plaintiff obtained under the contract of service, because I take it it is part of the contract of service made by him with the defendants. If there were no such contract, he could not obtain compensation, unless by agreement with his employers, without bringing an action either in the Superior Court or the County Court, and in that action he would be exposed to the risk of being unable to prove that the accident was the result of negligence of some one for whom the company were responsible. The injuries might, for instance, have arisen from concealed defect of machinery not known to the company, or by pure accident not brought about by any negligence

on the part of the company's servants. The burden of proving that it was otherwise would have been on the plaintiff, and that is a burden which often cannot be supported. Even if the plaintiff were successful in shewing this and obtained judgment, and the defendants had to pay his costs, it is a matter of common knowledge that the plaintiff would have to incur extra costs beyond those that he would recover. Such extra costs would have to be paid out of the damages which he would recover; and we all know that in a majority of the cases in which only small damages are recovered those damages are seriously encroached on in meeting the extra costs.

The risk of non-success owing to difficulty of proof, and the risk of obtaining but small advantage from a successful action, are both obviated by this agreement, under which, even if it is clear that there is no legal claim which could be enforced against the company, he is still entitled to compensation. Some disadvantages to the infant have been pointed out in the contract; but it does not prevent the contract being for the advantage of the infant that it contains some things that are not to his advantage. If upon consideration of the whole agreement there is a manifest advantage to the infant, he cannot avoid it. Under the circumstances of this case, I have come to the conclusion that the contract was for the benefit of the plaintiff, and binding on him, and its existence is therefore an answer to the claim made in this action. The appeal will, therefore, be dismissed.

KAR, L. J. . . . It has been clearly held that contracts of apprenticeship and with regard to labour are not contracts to an action on which the plea of infancy is a complete defence, and the question has always been, both at law and in equity, whether the contract, when carefully examined in all its terms, is for the benefit of the infant. If it is so, the court before which the question comes will not allow the infant to repudiate it.

The plaintiff seems to have been in the employment of the company for a week, and then to have signed the form which made him a member of the insurance society. We are told that this is made a condition of service by the company. I think, therefore, that the case has been rightly treated on the footing that this was part of the terms of a labour contract entered into between the plaintiff and the company, and I agree with the Divisional Court that, on examination of the whole contract, it is for the benefit of the infant, although it contains terms that, standing alone, would not be for his advantage. There is, therefore, no right on the part of the infant to repudiate the contract.

[Remainder of opinion omitted.]

A. L. SMITH, L. J. . . . Under these circumstances, we have to consider whether the suggestion that this contract did not bind the infant is or is not correct. There can be no doubt that *primâ facie* an infant is incapable of contracting; but to this rule there are exceptions. and I will read from the judgment of Fry, L. J., in *De Francesco v*

Barnum, 45 Ch. D. 430, the one applicable to this case. The learned judge, having stated the general rule as to the incapacity of an infant to bind himself, and enumerated some of the exceptions, said: "There is another exception which is based on the desirableness of infants employing themselves in labour, therefore, where you get a contract for labour, and you have a remuneration of wages, that contract, I think, must be taken to be, *primâ facie*, binding upon an infant." I take this to be good law. *Primâ facie*, therefore, this contract is binding upon the plaintiff

In my judgment, it is a fair contract for the infant. First of all, no matter how the accident may happen to him, and whether he has a remedy in a court of law or not, he is to have payments made to him according to the scale set out in the rules of the society. He avoids litigation, and having, if successful in litigation, to pay costs as between solicitor and client out of the damages he may recover. He avoids also the uncertainty of getting a verdict and the difficulty of establishing a cause of action. In my judgment, the agreement, instead of being detrimental to the infant, is, on the whole, manifestly to his advantage. The answer which is set up to this agreement, therefore, fails, and the appeal should be dismissed.

Appeal dismissed.

STONE v. DENNISON.

1832. 13 *Pickering* (Massachusetts), 1.

ASSUMPSIT for work and labor.

At the trial before WILDE, J., the plaintiff proved that he had been in the service of the defendant from October, 1818, to October, 1828, when he became twenty-one years of age; and he introduced evidence tending to show that his services were worth more than the support and education furnished him by the defendant. Evidence was offered by the defendant tending to show the contrary, and that the agreement was a reasonable one.

The defendant contended that he was not liable, because at the time when the plaintiff was fourteen years of age, his father being dead, George Eels was duly appointed his guardian, and it was agreed between the plaintiff, the defendant, and the guardian, that the plaintiff should continue in the service of the defendant, until he should arrive at the age of twenty-one, for his board, clothing, and education, and the defendant had performed the contract on his part.

The plaintiff objected to the admission of evidence to prove these allegations.

1. Because the supposed contract was void by the statute of frauds, it not being in writing.

2. Because, the plaintiff having no property and his mother being living at the time, the appointment of the guardian was void; or, at least, if valid, it gave the guardian no power to bind the plaintiff by the contract stated; and the plaintiff could not be bound by any assent given by himself to the agreement during his infancy.

But the judge admitted the evidence, and instructed the jury that, if the plaintiff entered into this agreement as contended for by the defendant, and entered into the service of the defendant in pursuance of the same, and continued in it during all the time agreed upon, he could not waive the contract and go upon a *quantum meruit*, unless the contract was obtained by unfair means, and so was fraudulent on the part of the defendant; and that if the contract was so unreasonable as to show that the plaintiff was overreached, that would be evidence of fraud, and would render the contract null and void.

The jury found a verdict for the defendant, and the plaintiff moved for a new trial. If the foregoing opinions and instructions were erroneous, a new trial was to be granted; otherwise judgment was to be rendered on the verdict.

Wells, for plaintiff.

[Argument omitted.]

Bates and Dewey, for defendant.

SHAW, C. J. Several points were left to the jury in the present case, which may be considered as settled by their verdict.

By the report it appears that, after the plaintiff arrived at the age of fourteen years, having then lived several years with the defendant, it was agreed between the plaintiff and his guardian on the one side, and the defendant on the other, that the plaintiff should continue in the service of the defendant until he should arrive at the age of twenty-one, for his board, clothing, and education. By the finding of the jury, under the instructions given to them by the court, it must be taken to have been settled that the contract was not obtained by any unfair means, or fraudulent, on the part of the defendant, and that it was not unequal, so as to show that the plaintiff was overreached.

The case then is one of a minor over fourteen years of age entering into an agreement with a person for labor and service to be furnished on one side, and subsistence, clothing, and education on the other, an agreement in which the minor was not overreached, which was not so unreasonable as to raise any suspicion of fraud, and which was assented to and sanctioned by the guardian of the minor. This agreement is fully executed on both sides; the labor and services are performed by the minor, and the stipulated compensation is furnished by his employer. And the question is, whether the plaintiff, notwithstanding such agreement, can maintain a *quantum meruit* for his services, merely by showing that, in the event which has happened, his services were worth more than the amount of the stipulated compensation; and we think he cannot.

The first point taken by the plaintiff is that the evidence of the

agreement ought not to have been admitted, because the agreement, not being to be performed within a year, and not being in writing, was void by the statute of frauds. St. 1788, c. 16, § 1.

But we think this objection is answered by the consideration that here the contract has been completely performed on both sides.

[The remainder of the opinion on this point is omitted.]

We do not think it necessary, in the present case, to consider some of the points made in the argument as to the cases in which the judge of probate has the power, under the statute, to appoint guardians to minors, and as to the authority of such guardians over the persons, property, and rights of their wards, because we are all clearly of opinion that the contract in question was one which the minor, with the consent of the guardian, was himself competent to make.

It is a well settled rule of law that a minor, under the age of twenty-one years, cannot bind himself generally by his contracts, for want of legal capacity. But as an exception to this general rule, it is equally well settled that a minor may bind himself by a contract for necessities, if equal and reasonable, and also that he may make contracts which are beneficial to him. We think the present case brings the contract under the first of these exceptions.

A contract for subsistence, clothing, and education is a contract for necessities, and is one therefore which the minor has capacity to make, and which, if reasonable and beneficial, will be supported by the law. Most of the cases, where it has been decided that a minor cannot be held on his express contract for necessities, are those where the action is founded on the express obligation, and where, from the form of the action, the consideration cannot be inquired into. As an action on a bond with a penalty, which implies a consideration, and where an inquiry into the consideration is precluded by the forms of pleading and proof. So on an *insimul computassent*, where the action is founded upon the act of accounting and the admission of the balance, and no further inquiry into the consideration and terms of the contract can be gone into. These actions are founded on the assumption that the party has full power to bind himself by any lawful contract, and they only open the question whether he has so bound himself. But in the other forms of obligation and of action, and where it can always be open to inquiry, what the nature and terms of the contract were, and whether the contract was reasonable and beneficial, a minor may as well be bound by an express as by an implied contract for necessities. This is often beneficial to the minor, and enables him to avail himself of any stipulations in his favor. If such an express contract should be held to be wholly void, and the party furnishing the minor with necessities should be remitted to his action on the implied contract, he would recover upon a *quantum valebant* or *quantum meruit*, though above the stipulated prices. The rule, as above qualified, that a minor shall only be bound by such a species of express contract, and in such a form of action, as leaves the nature, terms, and consideration of the contract

open to inquiry, and then only by such a contract as shall appear at the time to have been fair, reasonable, and beneficial to the minor, affords a sufficient security to the rights of minors.

And it appears to the court, taking into consideration the age of the minor when the contract was made, and the circumstances attending it, that it was reasonable and beneficial. It is to be considered that the employer took upon himself the risk of the health, life, and bodily and mental capacity of the plaintiff to labor. Had he been sick or otherwise incapable of performing any labor, the defendant was nevertheless, by the terms of his contract, bound to support him. These considerations may have rendered the contract equal and beneficial at the time, although in the event, which could not then be foreseen, the plaintiff's labor may have been of greater value than the subsistence and education which he obtained as an equivalent. The circumstance, also, that the contract was made with the consent and approbation of the guardian, evinced by his becoming a party to it, goes strongly to show that the contract was entered into deliberately, and with a just regard to the rights and security of the minor. And it would be injurious rather than beneficial to minors to hold that a contract thus made is of no legal force and effect.

We think the instructions of the court were correct, and there must be

Judgment on the verdict.

SPICER v. EARL.

1879. 41 *Michigan*, 191.

ERROR to Eaton.

Assumpsit. Defendant brings error.

I. H. & John M. Corbin, for plaintiff in error.

[Argument omitted.]

Wood & Kenney, and *E. A. Foote*, for defendant in error.

COOLEY, J. Earl sued Spicer to recover for services as a miller. The services commenced July 5, 1877, and continued until May 14, 1878. Earl claims to have been an infant until March 8, 1878. He however made the contract of service on his own behalf, and it does not appear that Spicer knew he was under age. When Earl left the service of Spicer in May, the parties attempted to settle, but failed. Earl claimed that the contract between the parties had been that he was to be paid one dollar a day for his services, and to have his board. Spicer admitted that this was the first arrangement, but claimed that it had been subsequently changed and the wages reduced. Earl had had his board for the whole period, and some payments in money, and there is nothing in the record to indicate that he had at any time repudiated the contract as he understood it. On the contrary, he seems

to have continued to work under it for more than two months after he came of age, and only dissented from it after the failure to settle. He then brought suit on a *quantum meruit*.

The circuit judge instructed the jury that if the plaintiff was an infant when he made the contract of service, he was not bound by it, and could collect the value of his services for the time he worked, unless he had affirmed it after coming of age; and he submitted it to the jury to determine whether anything had been done by him after coming of age by way of affirming or ratifying. The verdict indicates that the jury gave the plaintiff what they believed was the value of his services, and disregarded the contract.

The principle laid down in the case of *Squier v. Hydliff*, 9 Mich. 274, governs this case. It was there held that an infant was bound by his executed contract of service if it was reasonable under all the circumstances, or not so unreasonable as to be evidence of fraud or undue advantage. It is true the contract in that case was one for necessities exclusively, while this was for necessities only to the extent of the board; but the fact that something more was to be paid to the infant is not very important. Family servants and many others are commonly employed on the same terms as was this infant. It would be absurd as well as mischievous that the right to disaffirm should depend on the circumstance that the employer was to pay something besides the servant's support. It was well said by Justice Christiancy in the case mentioned that "it is essential to the protection of infants that they should be bound by contracts of this kind after they have been executed; and this idea of protection lies at the basis of the whole law of infancy. Should the law recognize the right of repudiation in such cases, no man could furnish an infant with the necessities of life in compensation for his services without the risk of a lawsuit; and the minor, though able and willing to earn his support, would often be deprived of the opportunity, and driven, perhaps, to vagrancy and crime."


No better illustration of the truth of what is here said can be had than this case presents. This infant was upwards of twenty years of age when he hired out his services, and there is no pretense that he did not understand the current wages, or act with entire independence in making his bargain. There is no reason to suppose he was overreached. If the employer testifies to the truth, his business was entirely unremunerative, and the employment was more likely a favor to the employed than to the master. Had the latter understood that he was subject to the liability, after the labor had been performed, to be called upon to pay for it any price that might be made out on the judgment of others, he would have refused to employ the infant at all; and the latter would have gone without employment — or at least without wages — because any one who should promise him more than the necessities of life might be compelled to pay an indefinite price to be fixed afterwards by a jury, with costs in addition.

Prudent men would not give employment under such circumstances, especially at a time when labor is not at all in demand, and when employment at anything more than one's board is often a matter of kindness and favor. Such a time has been within the experience of many persons within the last five or six years.

It is a harsh rule which permits the infant to repudiate his contract after he has executed it, where no advantage has been taken of him, and where the party dealing with him was not aware of his infancy. Where only the infant's services are in question, the rule should not be extended beyond what is absolutely necessary to proper protection; it should not be allowed to become a trap for others, by means of which the infant may perpetrate frauds. If a contract for service is apparently fair and reasonable under the circumstances, the infant who has performed it should be held to its terms, and if he attempts to repudiate it, the attention of the jury should be directed to the question whether or not an unfair advantage has been taken of him, instead of their being required to find a subsequent affirmation. So long as the employer who is acting in good faith is not notified of any dissent, he has a right to understand that his responsibility is measured by his agreement. On the other hand, the infant may abandon the service when he pleases, or stipulate for any new terms he may see fit to demand and can procure assent to. He is bound by the terms of the contract so far as he executes it without dissent, but no further. But we have no hesitation in saying that if evidence of affirmation of the contract were required, the jury ought to have found it in this case in the fact of the service being continued without demand for increased wages after the infant came of age.

Whether the wages were reduced or not by the action of the parties is a question on which they disagreed, and which must go as a disputed fact to another jury. Spicer testified that he found he could not afford to pay wages as originally agreed, and notified Earl that if he continued in his employ he should pay thereafter only ten dollars a month, and that Earl continued to work for him without notifying him that he should claim more. If the jury should find this to be the fact, it would constitute a new arrangement, and the recovery should be limited accordingly.

The judgment must be reversed with costs, and a new trial ordered. The other justices concurred.



GAFFNEY v. HAYDEN.

1872. 110 Massachusetts, 137.¹

MORTON, J. This is an action of contract to recover for work and labor performed by the plaintiff for the defendants in the months of April and May, 1870. The plaintiff is a minor. It appeared at the trial that he went into the employment of the defendants in January, 1870, under a special contract to work for three years; that his work was "grinding bibbs;" that he agreed to work by the piece and was to receive nine cents for each bibb which passed inspection; and that he left in May, 1870. The defendants put in evidence to show that the work of the plaintiff which passed inspection during the time covered by the writ was only \$3.65, and claimed that he could recover only that amount. The court ruled in effect that the plaintiff could avoid his express contract and recover upon a *quantum meruit*. If this ruling was correct, the accompanying instructions were sufficiently favorable to the defendants. In *Moses v. Stevens*, 2 Pick. 332, the subject was carefully considered, and the court held that a special contract by a minor for his services was voidable, and that, upon avoiding it, he might maintain an action upon a *quantum meruit*, and recover a reasonable compensation for his services, as though no such contract had been made. In *Stone v. Dennison*, 13 Pick. 1, the minor, with the concurrence of his guardian, had made a contract to remain in the service of the defendant until he should arrive at the age of twenty-one years, for his board, clothing, and education. The court held that the case was not within the general rule, that a minor cannot bind himself by his contracts, for want of legal capacity, but that the contract was for necessities, and being shown to be beneficial to the minor, he could not avoid it after it was fully executed on both sides. In *Vent v. Osgood*, 19 Pick. 572, it was held that the contract of a minor to perform a whaling voyage was voidable, that it was avoided by his desertion during the voyage, and that he could recover a *quantum meruit* for his services.

The case at bar falls within the principle of *Moses v. Stevens*. The contract which the defendants seek to make binding upon the plaintiff is merely an executory contract for the plaintiff's services. The law gives him the privilege of judging whether it is beneficial or not, and of avoiding it if he so elect. Having avoided it he is entitled to recover a *quantum meruit*, in the same manner as if he had worked for the defendants without any contract between them.

The defendants rely upon the case of *Breed v. Judd*, 1 Gray, 455. But that case is entirely unlike the case at bar. The substance of the contract was that the defendants were to furnish an outfit to the plaintiff to go to California; that the plaintiff was to furnish his labor and

¹ Statement omitted. — Ed.

time ; and that of the fruits of the enterprise two thirds were to belong to the plaintiff and one third to the defendants. The contract was fully executed on both sides ; the plaintiff had sent forty-two ounces of gold dust to the defendants, being one third of the avails of his labor, and, after he became of age, he brought this suit to recover the value of said gold dust less the amount of the outfits expended on his account. The court considered that the plaintiff, under the privilege of infancy, could have avoided his contract while it remained executory, but decided that the effect of avoiding it after it was executed, was not to change the relations of the parties, and to enable him to recover of the defendants as his own the third part which had vested in them as their proportion of the joint adventure. The contract was shown to be a beneficial one. Whether, if it had been a hard one, he could recover such share of the proceeds as would be a reasonable compensation for his labor, did not arise, and was not considered.

Upon the whole, a majority of the court is of opinion that the rulings of the presiding judge in this case were correct.

Exceptions overruled.

DEROCHER v. CONTINENTAL MILLS.

1870. 58 Maine, 217.

On exceptions.

Assumpsit upon an account annexed for 25½ days' work, at \$1.25 = \$31.87, ending June 29, 1869.

The case was referred to the presiding judge, with the right of alleging exceptions.

The judge found, as matter of fact,

That the defendants are a corporation and operators of a large cotton mill in Lewiston ; that the plaintiff is a minor, and that she was emancipated by her father before the services for which this suit is brought were rendered ; that when she commenced work for the defendants, she entered into a contract to work for them six months, at least, and give no less than two weeks' notice before leaving, failing in which she was to forfeit the wages due ; that after working a portion of the time agreed upon, she left without giving any notice ; that the loss resulting to the defendants, in consequence of the plaintiff's leaving without notice, exceeded the amount of her wages then due.

Upon these facts the presiding judge ordered judgment for the defendants ; whereupon the plaintiff alleged exceptions.

Pulsifer & Frost, for the plaintiff.

Wm. P. Frye & J. B. Cotton, for the defendants, cited 1 Am. Lead. Cas. 259 ; *Moses v. Stevens*, 2 Pick. 332 ; *Vent v. Osgood*, 19 Pick. 572 ; *Judkins v. Walker*, 17 Maine, 38 ; *Thomas v. Dyke*, 11 Verm. 273 ; *Schouler's Dom. Rel.* 561 and note.

WALTON, J. The question is, whether a minor, who has agreed to work for a manufacturing corporation at least six months, and not leave without giving two weeks' notice, but does leave without giving such notice, is liable to have the damages occasioned thereby deducted from the amount he would otherwise be entitled to recover for his labor.

We think not. To compel the minor thus to make good the loss occasioned by the non-performance of his contract, is virtually to enforce the contract; and thus to enforce the contract is in effect to abrogate the rule of law that a minor is not bound by his contract. We presume no one would undertake to maintain that an action would lie against an infant to recover damages for the breach of such a contract; and yet it seems to us that there can be no difference in principle between deducting the damages from the amount which the infant would otherwise be entitled to recover in a suit brought by him, and recovering the same in a suit brought against him. Stripped of all its sophistical surroundings, we think the doctrine contended for in defense amounts to simply this, that the minor's contract not to leave without giving two weeks' notice was obligatory, and having violated it, he must pay the damage. Such a doctrine cannot be maintained.

The decisions on this branch of the law furnish us with a curious and instructive illustration of the mischief that is liable to be done when judges undertake to generalize too much, and to decide more than is presented by the cases then before them.

In a case before the House of Lords on appeal, one of the questions was, whether an infant could, by contract, bar her dower. Lord Mansfield, in delivering his opinion, is reported to have said, "If an infant pays money with his own hand, without a valuable consideration for it, he cannot get it back again." *Buckingham v. Drury*, 2 Eden, 60.

Relying upon this *dictum*, it was afterwards held in England that money advanced by an infant for a lease of real estate, which he afterwards avoided, could not be recovered back. *Holmes v. Blagg*, 8 Taunt. 508.

Relying upon the same *dictum*, and the above decision, it was afterwards held in New York, that where an infant does work in part performance of a contract, which he fails to complete, he cannot recover for it. *McCoy v. Huffman*, 8 Cowen, 84.

Similar decisions were made in Indiana and New Hampshire. *Harney v. Owen*, 4 Blackf. 337; *Weeks v. Leighton*, 5 N. H. 343.

But these decisions, and the *dictum* of Lord Mansfield (so clearly erroneous, that one is almost led to doubt whether he could ever have made it), have all been overruled.

In England, the *dictum* of Lord Mansfield, and the use made of it in *Holmes v. Blagg*, 8 Taunt. 508, were repudiated in *Corpe v. Overton*, 10 Bing. 252. In the latter case, the court held that money paid by an infant toward the purchase of a share in the defendants' business, could be recovered back.

In New York, the decision in the 8th of Cowen was overruled in the

7th of Hill, 110 (*Medbury v. Watrous*). In the latter case, it was held that where an infant enters into a contract for the purchase of property, and performs work in part-payment of the price, but avoids the contract on arriving at full age, he may recover for the work.

In Indiana, the decision in the 4th of Blackford, 337, was overruled in *Dallus v. Hollingsworth*, 3 Ind. 537.

In New Hampshire, the decision in the 5th of New Hampshire, 343, was overruled in *Lufkin v. Mayall*, 25 N. H. (5 Foster), 82. In the latter case, it was held that an infant, who has avoided his contract for labor on the ground of infancy, may recover compensation for his services performed under it.

In Massachusetts, it was held that where an infant performs labor on a special contract, which he afterwards abandons, he may recover for his services, "as if no such contract had been made." This is undoubtedly the true rule of law. But in closing the opinion, the court inserted one of those unfortunate *dicta*, apparently unconscious that it was utterly inconsistent with the rule just laid down, namely, that the rule would do no injustice, "because the jury would give no more than under all the circumstances the services were worth, making any allowance for any disappointment amounting to an injury which the defendant in such case would sustain by the avoiding of the contract." "It seems," therefore, says the reporter in his syllabus of the case, "that if the employer is injured by the sudden termination of the contract without notice, a deduction should be made on that account." The court just laid down the rule that the case is to be tried precisely as if no special contract had been made, and then add, in substance, that a deduction must be made for the breach of it. *Moses v. Stevens*, 2 Pick. 332.

In a later case in Massachusetts, the true rule is again stated, that by the avoidance of an infant's contract, it is annihilated *ab initio*, "and the parties are left to their legal rights and remedies just as if there had never been any contract at all;" and the absurd qualification annexed to it in the case just cited is, of course, omitted. *Vent v. Osgood*, 19 Pick, 572.

And in New York the qualification attempted (inadvertently we have no doubt) to be engrafted upon the rule applicable to such cases, was expressly overruled. The court said they could not yield their assent to the soundness of such a qualification; and the court held, that an infant plaintiff in such an action is entitled, by well-settled principles of law, to recover such sum for his services as he would be entitled to if there had been no express contract made. *Whitmarsh v. Hall*, 3 Denio, 375.

The *dictum* of Lord Mansfield, in *Buckingham v. Drury*, 2 Eden, 60, that "if an infant pays money with his own hand, without a valuable consideration for it, he cannot get it back again;" and the remark in the opinion of the court in *Moses v. Stevens*, 2 Pick. 332, that "the jury would make an allowance for any disappointment amounting to an

injury which the defendant in such case would sustain by the avoiding of the contract," are undoubtedly the cause of most, if not all, of the confusion to be found in the books on this branch of the law.

We think the rule of law, applicable to this class of cases, is correctly stated in *Vent v. Osgood*, 19 Pick. 572; and in the opinion of this court in *Robinson v. Weeks*, 56 Maine, 102; and is substantially this, that when an infant's contract is legally avoided, the rights of the parties are precisely the same as if it had never been made.

Having avoided her contract to work not less than six months, and not to leave without giving two weeks' notice, the plaintiff had a right to have her case tried and determined precisely as if no such contract had ever been made. Yet her case was not thus tried. The defendants were allowed, first, to show that such a contract was made, then the breach of it, then the loss resulting to them by reason of its breach. They then had the amount of such loss deducted from the wages due to the plaintiff; and the loss being greater than the wages, the plaintiff's suit was defeated, and judgment ordered for the defendants. Surely that was not having the rights of the parties tried and determined precisely as if no such contract had ever been made; for if no such contract had ever been made, certainly no such result could have been reached.

Exceptions sustained. New trial granted.

APPLETON, C. J., KENT, BARROWS, and DANFORTH, JJ., concurred.

CUTTING, J., did not concur. TAPLEY, J., concurred in sustaining the exceptions.

HAGERTY v. NASHUA LOCK CO.

1883. 62 *New Hampshire*, 576.

ASSUMPSIT. Facts found by the court. The plaintiff is a minor. He engaged to work for the defendants two years, and to learn the trade of a moulder. The defendants agreed to pay him \$1.00 a day for the first quarter of the two years, \$1.17 for the second quarter, \$1.34 for the third quarter, and \$1.50 for the fourth quarter. They were to retain ten cents for each day's work until the end of the two years. If he voluntarily left their employment in violation of the agreement, he was to forfeit the amount retained, and all wages due when he left. No memorandum of the contract was signed by or for him. At the end of five months he left in violation of the agreement. He was paid, according to the agreement, at the end of each of the first four months, and the payments were more than he earned in those months. During the fifth month he earned ninety cents a day. If the value of his services during the five months, and the payments made, are taken into account, he is entitled to recover \$16. If there can be no deduction on account of over-payments, the sum due him is \$32.50.

G. B. French, for the plaintiff.

J. B. Fassett, for the defendants.

DOE, C. J. On a *quantum meruit* the plaintiff demands what he is justly entitled to. The contract which he repudiated, and on which four payments had been made, was an entire one for two years' work. He can recover no more than is equitably due; and equity considers the whole transaction, including the fact that during the first four months he received more than he earned. The question of justice is not limited to a month, or to the damages for which the defendants can maintain an action against him. The law of the case is no more inconsistent with moral right than his contractual disability requires. *Hall v. Butterfield*, 59 N. H. 354; *Bartlett v. Bailey*, 59 N. H. 408.

Judgment for the plaintiff for \$16.

STANLEY, J., did not sit: the others concurred.

WAUGH v. EMERSON.

1885. 79 *Alabama*, 295.¹

APPEAL from City Court of Selma.

Action by Walker Emerson, a minor suing by his next friend, against Emeline Waugh, to recover wages for personal services. Defendant pleaded *non assumpsit* and payment before suit brought. Trial on issues joined on these pleas.

Plaintiff testified, among other things, that he was discharged by defendant without cause.

Defendant testified, among other things, that she had advanced to plaintiff during the year, from time to time, on request, money, tobacco, articles of clothing, &c., of which she kept an account; and she produced this account, the items aggregating \$75.60.

[Other facts appear in the opinion.]

Defendant requested the following instruction:

(5.) "If the jury believe, from the evidence, that the plaintiff is a minor, eighteen or nineteen years of age, and that his father has been dead for several years; then it was his right and duty to work at some legitimate calling or labor for his support and maintenance, and it was lawful and right for the defendant to hire him; and if she did hire him, and he performed work or labor for her, then it was lawful and right for her to pay him for such work; and if she did then, in good faith, pay him any sum or sums for his labor, then he cannot recover in this suit the value of the services or labor thus paid for."

The court refused to give this instruction.

Verdict for plaintiff

S. W. John, for appellant.

Brooks & Roy, contra.

¹ Statement abridged. — ED

STONE, C. J. Walker Emerson, the plaintiff in this suit, was without a father, the latter having died several years before. His mother had contracted a second marriage, and was the wife of another. Walker was about nineteen years old, and had no guardian. He is not shown to have had any estate. Commencing in the latter part of 1884, or with the year 1885 — (the testimony is somewhat in conflict on this point) — he agreed to serve Mrs. Waugh at agreed price, either by the month, or for the year's work. He was to perform farm labor, but the parties disagree as to the kind of labor he was to perform. In fact, the testimony is in conflict on every disputable question of fact in the cause. In October the plaintiff finally left Mrs. Waugh's service. Mrs. Waugh claims that, during the continuance of the service, she made to the plaintiff many partial payments of his wages in money and merchandise, and that he lost much time from his work, for which she claims a ratable discount from his agreed compensation. Emerson in his testimony denies the extent of Mrs. Waugh's claims of payment and discount. These were the main issues of fact before the jury.

For the plaintiff — appellee here — it was contended in the court below, and the contention is renewed here, that the doctrine of an infant's liabilities for necessary articles furnished him, must be applied to Mrs. Waugh's asserted partial payments made; and that unless such payments and furnishings were in fact necessities, suitable to his estate and condition in life, then Mrs. Waugh is not entitled to a credit for them. We cannot assent to this. The contract to serve was made by Emerson; and though a minor in years, he was in fact and in law emancipated. No one was bound to support him, and no one but himself could claim his wages. He had a clear right to direct and appoint their payment, and no other person could interpose and assert a paramount right to them. The present suit, brought while he was yet a minor, is itself an assertion of his right to collect them. His guardian *ad litem* would have no right to control the recovery. Will it be contended that the judgment he might recover could not be collected until a legal guardian is appointed to receive it? and if paid to him, or to his guardian *ad litem*, when the collection is coerced by execution, will the defendant be liable to another recovery, when a legally appointed guardian comes to claim it? *Donegan v. Davis*, 66 Ala. 362; *Glass v. Glass*, 76 Ala. 368; *Nightingale v. Withington*, 15 Mass. 272; *Whiting v. Earle*, 3 Pick. 501; *Johnson v. Silsbee*, 49 N. H. 443; *Isaacs v. Boyd*, 5 Por. 388; *Ware v. Cartledge*, 24 Ala. 622; *Clark v. Goddard*, 39 Ala. 164; *Engelhardt v. Yung*, 76 Ala. 534.

Situated as the defendant was, with no one but himself entitled to his earnings, he was entitled to receive compensation for his services, and equally entitled with an adult to receive partial payment while the work progressed. Payments to an infant should, probably, be scrutinized more narrowly, that frauds upon him, either in price or quality, be not sanctioned by the court. Beyond this, and with the exception of over-reaching bargains, the right of an emancipated minor to receive com-

compensation for labor performed by him pursuant to his own contract, express or implied, rests on the same principle as that of an adult. The fifth charge asked and refused should have been given. We need not notice the other questions raised.

Reversed and remanded.

MORSE v. ELY.

1891. 154 Massachusetts, 458.

CONTRACT, brought by an infant for wages alleged to be due him from the defendant. Trial in the Superior Court, without a jury, before BOND, J., who found for the plaintiff for the amount claimed by him, and allowed a bill of exceptions, the substance of which appears in the opinion.

C. L. Gardner, for the defendant.

J. B. Carroll, for the plaintiff.

BARKER, J. The plaintiff, when of the age of twenty years and in the employment of the defendant, agreed with him that there should be applied toward the payment of his wages a sum of \$10, the difference between the price of a horse and that of a cow which he received in exchange from the defendant, and also further sums for the services of a stallion and of a bull, and for a calf which he bought of the defendant, and for the pasturage of a horse. These items were credited by the minor in his account with his employer. The contracts from which they resulted were fairly made, the prices were reasonable, and all the contracts were in fact beneficial to the minor. The cow, and a colt resulting from the service of the stallion, have been sold by him at their full value, for cash. Whether he is yet in the possession of the calf does not appear. He has elected to avoid his contracts with the defendant, and has brought this action to recover for his wages, without deduction for any of the items. The question raised by the bill of exceptions is whether, under the circumstances, the defendant is entitled to be credited with their amount.

None of the contracts were for necessities. The plaintiff had therefore a right to avoid them at his election, and it was not necessary for him, in order so to do, to return the consideration received, or to put the other party *in statu quo*. *Chandler v. Simmons*, 97 Mass. 508, 514. *Bartlett v. Drake*, 100 Mass. 174, 177. *Walsh v. Young*, 110 Mass. 396, 399. *Dubé v. Beaudry*, 150 Mass. 448. *Boody v. McKenney*, 23 Maine, 517. *Price v. Furman*, 27 Vt. 268.

If the sums which the defendant seeks to apply in payment had been actually paid to him in money, the plaintiff, upon rescinding his contracts, could recover them back. *McCarthy v. Henderson*, 138 Mass. 310. *Pyne v. Wood*, 145 Mass. 558. The defendant cannot avail

himself of and enforce, by way of an allegation of payment, contracts which he could not enforce by a direct suit. *McCarthy v. Henderson*, 138 Mass. 310. To allow him to do so would be to affirm and enforce against the minor contracts which for his protection the law allows him to rescind.

Exceptions overruled.

SECTION II.

Where Infant has acquired and enjoyed an Interest in Property of a Permanent Nature with Obligations attached to it.

BLAKE v. CONCANNON.

1870. 4 *Irish Reports, Common Law*, 323.

THIS was a Civil Bill Appeal, which was heard before the Lord Chief Baron at the Galway Summer Assizes, 29th July, 1868. It was subsequently argued before His Lordship (by leave reserved) in Chamber, at Dublin, in the following November.

The Civil Bill was for rent.

The facts of the case appear sufficiently from the judgment.

Monahan, Q. C., appeared for the appellant, the plaintiff below.

Robinson, Q. C., appeared for the respondent, the defendant below.

PIGOT, C. B. In this case I decided, in point of fact, at the hearing at the Assizes, that the defendant, under a letting made to him of the lands in question, in May, 1866, possessed and enjoyed the lands until the 20th of April, 1867; that he was under the age of twenty-one years when the letting was made; and that he still continued an infant on the 20th of April, 1867; that he, on that day, left the possession of the lands; and that, in due time after he had attained his majority (which event occurred shortly after he had left the possession), he repudiated the contract of tenancy, and the tenancy under it; but that in the interval, before he had repudiated, and while he continued in possession and enjoyment of the lands, a gale of the rent sued for became due on the 1st of November, 1866.

Upon these facts I reserved the point whether, by the repudiation, the defendant not only became exonerated from liability for the rent, which, if he was liable for it at all, became due on the 1st of May, 1867, but also for that which became due on the 1st of November, 1866, while he continued in possession and enjoyment of the lands.

[The learned Chief Baron said that, at first, he formed, and expressed, the opinion, that the defendant, having repudiated the letting in due time after he had attained his majority, and before he was sued for the rent, was entitled on the ground of his infancy, and of that

repudiation, to defend the action brought by this Civil Bill. After discussing various authorities, he reached the following conclusions.]

Upon a review of all the authorities, and I am not aware of any others materially affecting the question arising on this Civil Bill, I am satisfied that I was wrong in forming the opinion, which I did reluctantly, that, upon the view which I at first took of the passages in Bacon's Abridgment and in Rolle's Abridgment of the case referred to, and of the judgments of Baron Parke, in 5 Exchequer, the respondent, the defendant in the Civil Bill, was discharged from liability to the first gear of rent.

It appears to me now, upon a consideration of the grounds on which an infant is held to be liable where, by the authorities to which I have referred, his liability is established, if he does not waive or repudiate the tenancy and the land, that he ought to be held bound by that liability when it has been once attached to the payment of the rent which accrued while he has occupied, and before he has repudiated. He is not, in an action of debt for the rent, held liable upon the contract of tenancy alone. His liability arises from his occupation and enjoyment of the land, under the tenancy so created. If his liability arose from the contract alone, the repudiation of the contract, by annulling it, would annul its obligations, which would then exist only by reason of the contract. But the infant, though he can repudiate the contract of demise, and the tenancy under it, and can so revest the land in the landlord, cannot repudiate an occupation and enjoyment which are past, or restore to the landlord what he has lost by that occupation and enjoyment of the infant. The reason given by Justice Newton, in 21 Hen. 6, 31, b., lies at the root of the infant's liability: "He has had a *quid pro quo*." Though quaintly expressed, it is a reason sanctioned by common sense, and in accordance with plain justice. The infant owes the rent, because he has an equivalent in the occupation and enjoyment of the lands. The authorities to which I have referred appear to me sufficiently to indicate that, if the infant does not avoid the tenancy under which he occupies before the rent becomes due, the mere fact of infancy constitutes no defence. If, therefore, he continues so to occupy without repudiation, the landlord, on the accruing of the rent, has a vested right of suit against the infant for the rent which has so accrued. I cannot, on consideration, hold that such vested right can be divested by the mere repudiation of the infant, without a direct decision, or some unequivocal and acknowledged authority, sustained by general acquiescence or clear analogy of law. I have found none. The dictum of Baron Parke, in 5 Exchequer, 125, must be regarded with all the respect due to everything that fell from that eminent judge. But it was not necessary for the decision of the case before him; and it was manifestly founded on the passage in Bac. Abr. *Infancy and Age*, (1) 8, or was influenced by that passage. And I have shown that the proposition in Bacon's Abridgment, which is there contained, and which appears to have been thus adopted by

Baron Parke, was not warranted by the authorities cited in support of it.

On the whole, I am of opinion that the respondent, the defendant in the Civil Bill, was, and is, liable for the first gale of rent, but is not liable for the second, that the dismiss should be reversed, and that there should be a decree for the amount of the first gale.

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NORTH WESTERN RAILWAY CO. v. M'MICHAEL.

1851. 5 *Exchequer*, 114.¹

DEBT. The first count states that the defendant is the holder of ten shares in the Company, and is indebted to plaintiffs in the sum of 112*l.* 10*s.*, in respect of six calls on each share; whereby an action hath accrued to plaintiffs, by virtue of the "Companies Clauses Consolidation Act, 1845," and the "North Western Railway Act, 1846," to demand from the defendant the said sum.

Plea [in substance] — That defendant applied to the Company for said shares; that the Company, in pursuance of such application, granted the shares to defendant and entered his name in the register as proprietor; and so the defendant became and still is the original holder and proprietor by contract with the Company, and not otherwise. That, when defendant applied, and when the shares were granted and his name entered, and also at the respective times of making the said calls, defendant was an infant within the age of twenty-one years, to wit, of the age of twenty years. That defendant has never ratified said application, grant, entry, and proprietorship. That defendant has never derived any profit, or advantage from the shares or from his proprietorship, and that such proprietorship has always been wholly unprofitable and useless to defendant.

Demurrer, and joinder therein.

Willes, in support of the demurrer.

Cleasby, *contra*.

Cur. adv. vult.

PARKE, B. The question to be decided in the case of *The North Western Railway Company v. M'Michael* is, whether the first plea (the second to the second count being identical) contains a good *primâ facie* answer to the declaration. If the effect of a person actually becoming a shareholder in a railway company, by original agreement with the Company, ought to be treated as a mere contract with those to whom the proposal was made, for a future partnership with the persons who should be afterwards fixed upon by them, and to contrib-

¹ Statement abridged. Arguments omitted. — Ed.

ute to the capital for carrying on the undertakings in a certain proportion, such a contract could not be presumably beneficial to an infant, and would be, as all mere contracts, except for necessities, are, not binding on the infant at all; and the simple fact, that the defendant at the time he made the contract was an infant, would be an answer to an action upon it. The same may be said of an executed contract for the purchase of a mere personal chattel. But in the cases already decided upon this subject, infants, having become shareholders in Railway Companies, have been held liable to pay calls made whilst they were infants. *The Cork and Bandon Railway Company v. Cazenove*, 10 Q. B. 935; *The Leeds and Thirsk Railway Company v. Fearnley*, 4 Exch. 26. They have been treated, therefore, as persons in a different situation from mere contractors, for then they would have been exempt; but, in truth, they are purchasers who have acquired an interest, not in a mere chattel, but in a subject of a permanent nature, either by contract with the Company, or purchase or devolution from those who have contracted, and with certain obligations attached to it, which they were bound to discharge, and have been thereby placed in a situation analogous to an infant purchaser of real estate, who has taken possession, and thereby becomes liable to all the obligations attached to the estate, for instance, to pay rent, 21 Hen. 6, 31 B., in the case of a lease rendering rent, and to pay a fine due on the admission, in the case of a copyhold to which an infant has been admitted, *Evelyn v. Chichester*, 3 Burr. 1717, unless they have elected to waive or disagree to the purchase altogether, either during infancy or after full age, at either of which times it is competent for an infant to do so: Bac. Abr. "Infancy and Age," (I) 5; Co. Litt. 380. This court accordingly held, in *The Newry and Enniskillen Railway Company v. Coombe*, 3 Exch. 565, that an infant who did avoid the contract of purchase during minority, was not liable to pay any calls. In the subsequent case of *The Leeds and Thirsk Railway Company v. Fearnley*, 4 Id. 26, where there had been no waiver or repudiation of the purchase, we held, in conformity with the decision of the Queen's Bench, that the defendant continued liable. We cannot say that we concur in the opinion of that court, as reported in 11 Jur. 802, and 10 Q. B. 935, if it goes to the full extent that *all* shareholders, including infants, are by the operation of the Railway Acts made absolutely liable to pay calls. No doubt the statute not only gave a more easy remedy against the holder of shares by original contract with the Company, for calls, and also attached the liability to pay calls to the shares, so as to bind all subsequent holders; but we consider, as we have before said, that there are implied exceptions in favour of infants and lunatics in statutes containing general words, (*Stowell v. Lord Zouch*, Plowd. 364,) though that depends, of course, on the intent of the Legislature in each case, (see Wilmot's Notes of Opinions and Judgments, p. 194, *The Earl of Buckinghamshire v. Drury*), and that this statute did not mean, by general words, to deprive infants of the protection which

the law gave them, against improvident bargains. Under this statute, therefore, our opinion is, that an infant is not absolutely bound, but is in the same situation as an infant acquiring real estate, or any other permanent interest: he is not deprived of the right which the law gives every infant, of waiving and disagreeing to a purchase which he has made; and if he waives it, the estate acquired by the purchase is at an end, and with it his liability to pay calls, though the avoidance may not have taken place till the call was due. (See Bac. Abr. "Infancy and Age," (I) 8.) The law is clearly laid down in Co. Litt. 2. b.: "An infant or minor hath, without consent of any other, capacity to purchase, for it is intended for his benefit; and, at his full age, he may either agree thereunto and perfect it, or, without any cause to be alleged, waive or disagree to the purchase; and so may his heirs after him, if he agreed not thereunto after his full age." A shareholder, indeed, in a railway company, or other chartered corporation, is not thereby made a holder of real estate: *Bligh v. Brent*, 2 Y. & C. 268; for all real estates are vested in the corporate body, not in the individuals composing it; but the shareholder acquires, on being registered, a vested interest of a permanent character, in all the profits arising from the land, and other effects of the Company, and, when registered, may be deemed a purchaser in possession of such interest, and is placed in a position analogous to that of a purchaser in possession of real estate.

When, therefore, there is nothing but the simple fact of infancy pleaded to an action for calls against a purchaser who has been registered, and thereby become a shareholder in a subject of a permanent character, the interest continuing to be vested in the infant, and the consequent obligation to pay, the simple plea of infancy is, according to the above authorities, insufficient; and on that ground we think the plea in the case of *The Birkenhead Railway Company v. Pilcher*, which we have to consider with this, bad, notwithstanding the verdict, and therefore are of opinion that the rule should be absolute to enter up judgment for the plaintiffs in that case, notwithstanding the verdict entered for the defendant.

But the case of *The North Western Railway Company v. M'Michael* contains, besides the averment of infancy at the time of the contracts for the shares, other special facts, — not a waiver by the infant, but averments that he had derived no advantage from the shares, and had never ratified or confirmed the purchase. This case is one of more difficulty.

The law upon this subject is to be found as early as 21 Hen. 6, 31 B, where it was held by Newton, J., that, if an infant lessee takes possession, he is bound to pay the rent; and in conformity with that ruling was the decision in a case reported in Brownlow, 120, as *Ketley's case*; Cro. Jac. 320, as *Kelsey's case*; 2 Bulst. 69, as *Kirton v. Elliott*; and in Roll. Abr. 731, as *Kettle v. Eliot*. The case is most fully reported in Brownlow. It was an action of debt for rent; the defendant pleaded his infancy at the time of the lease made, in bar; and it was

argued, on demurrer to the plea, that the defendant should be charged, because by the lease made he is become a purchaser, and so to be, in judgment of law, as a man of full age.

We collect that the principle upon which the court decided was, that, every purchase being presumably for the benefit of the infant, his purchase vested the estate in him on entry and taking possession, and rendered him liable to the obligations attached to it, until he disagreed to the estate, and thereby caused the conveyance to be inoperative, and avoided the obligation to pay rent. In referring to this case, the passage in *Bac. Abr.* "Infancy," (I) 8, treats the infant as being bound by reason of acquiescence after full age. How that could be collected from the reports of the case is not clear; and so Lord Ellenborough, in *Baylis v. Dineley*, 3 M. & S. 481, intimates an opinion that a lease is equivocal, whether for the benefit of the infant or not, and that, if he continues a possessor after age, he adopts it; and this was a part of the argument for the defendant at the bar. But it seems to us to be the sounder principle, that, as the estate vests, as it certainly does, the burthen upon it must continue to be obligatory until a waiver or disagreement by the infant takes place, which, if made after full age, avoids the estate altogether, and reverts it in the party from whom the infant purchased; if made within age, suspends it only, because such disagreement may be again recalled when the infant attains his majority.

But then arises a question of difficulty, whether the fact that this particular purchase was a disadvantageous one, is an answer, the estate still being vested in the infant. We are disposed to think that the plea does not sufficiently state that the contract was a losing one, or that the shares were not worth what the defendant agreed to pay, which they well might be, though the defendant himself had actually made no profit by them; but supposing the averment to be sufficient in that respect, we still think the plea bad.

This question appears to have been discussed in the case of *Ketley*, as reported in *Bulstrode*, *Haughton, J.*, expressing an opinion, that if the lease was for an acre at 100*l.* per annum, and the infant occupy and enjoy it, he is to be charged with the rent, he being here taken to be a purchaser; but *Dodderidge* said, that if a greater rent was reserved than the land was worth, that then, *peradventure*, the infant should not be charged. This opinion is more strongly expressed in the report in *Brownlow*. This is certainly a point of some nicety; but the question may be asked, why, in such a case, does not the infant disagree to and avoid the purchase, and so get rid of the obligation? and is it reasonable, that he should retain the estate and prevent the owner from having any use of it, and not be liable to the burthen, though disproportionate? It may be answered, that whilst he is an infant he is incompetent to decide whether he ought to waive the purchase or not, and in the meantime, he ought to be at liberty, or his guardian for him, to get rid of the liability, by shewing that it was a prejudicial contract. But if so, such a plea would not be good if the infant had attained his

majority, for then, clearly, he ought to disclaim it, and thereby give back the estate; and to make such a plea good, where there is no disclaimer averred, it ought to appear that the infant is not yet of age. The plea, as it stands, is by no means free from doubt. We think, however, the more reasonable view of the case is, that the infant, even in the case of a lease which is disadvantageous to him, cannot protect himself if he has taken possession, and has not disclaimed, — at all events, unless he still be a minor. We think that the defendant is in a situation analogous to that, unless he disclaims the interest, and so avoids the transaction altogether. He cannot keep the interest, and prevent the Company from having it, and dealing with it as their own, without being liable to bear the burden attached to it. For these reasons we think the plea is bad, and there must be judgment for the plaintiffs.

Judgment for the plaintiffs.

HAMILTON v. VAUGHAN-SHERRIN ELECTRICAL ENGINEERING COMPANY.

1894. *Law Reports* (1894), 3 *Chancery*, 589.¹

THE defendant company was registered Aug. 16, 1890, under the Companies Act, 1862.

The plaintiff, Miss Hamilton, then eighteen years of age, applied for shares, and paid £20 on such application. Oct. 6, 1890, twenty shares of £5 each were allotted to her. Oct. 18, 1890, she paid £40, the amount payable on allotment, and her name was placed on the register of shareholders accordingly. Nov. 18, 1890, she wrote to the secretary of the company, requiring repayment of the £60.

The plaintiff never received any dividends, nor attended any meetings of the company.

May 19, 1892, she brought this action: claiming (1) a declaration that the allotment was void; (2) that the register of the company might be amended by striking out her name; (3) that the company be ordered to repay her the £60 with interest; (4) that the company be enjoined from enforcing any call made, or to be made, on her in respect to the twenty shares.

June 10, 1892, the company went into voluntary liquidation; and on June 27, 1892, the liquidator removed plaintiff's name from the register of shareholders.

Reginald Hughes, for the plaintiff. The plaintiff, being an infant, has paid money for something which is not a necessary, and, there being a total absence of consideration, she is entitled to recover the money so paid. No dividend has been paid to her, and the liquidator

¹ Statement abridged. Part of opinion omitted. — Ed.

has properly taken her name off the register, so that she cannot share in the assets of the company. She has derived no intermediate advantage under the contract, and is entitled to have the money returned to her: *Corpe v. Overton*, 10 Bing. 252.

P. F. Wheeler, for the liquidator. An infant who pays money without valuable consideration cannot get it back: *Earl of Buckinghamshire v. Drury*, 2 Eden, 60, 72; *Holmes v. Blogg*, 8 Taunt. 508; *Ex parte Taylor*, 8 De G. M. & G. 254. There was here a distinct legal consideration. The shares were allotted to the plaintiff, and she had the right to receive dividends if declared, and to attend meetings. The consideration in such a case need not necessarily be of a marketable value.

Where the contract is executory an infant can recover; but where, as here, it is executed, she cannot: *Leake on Contracts*, 3rd Ed. pp. 476, 477. The plaintiff is not assisted by the Infants Relief Act, 1874.

Valentini v. Canali, 24 Q. B. D. 166, shews that the principle of the old cases is not to be limited by the Act.

Reginald Hughes, in reply. In all the cases where an infant has been held not entitled to recover there has been part performance and enjoyment of some advantage by the infant under the contract.

STIRLING, J. [After stating the cases of *Holmes v. Blogg*, 8 Taunt. 508; *Ex parte Taylor*, 8 De G. M. & G. 254; and *Corpe v. Overton*, 10 Bing. 252.]

It is to be observed [in *Corpe v. Overton*] that all the learned judges who dealt with the case distinguished it from *Holmes v. Blogg*, 8 Taunt. 508, on the ground that in that case there had been actual enjoyment of the demised premises. They did not say that the mere demise itself, in the absence of occupation, would have been enough, and it seems to me that the true rule to be drawn from the cases is to consider whether the infant has derived any real advantage under the contract.

In the present case there was no advantage to the infant. Certainly there was no pecuniary advantage to her. She took no part in the management of the company and did not attend any meetings. No doubt there was an allotment of shares, and her name was placed on the register. It seems to me that that is not an advantage within the rule of *Corpe v. Overton*, 10 Bing. 252. The consideration has totally failed and the plaintiff is entitled to recover, *i. e.*, to prove for the amount in the winding-up.

SECTION III.

Infant's partly or wholly Executed Contract of Partnership.

FOLDS v. ALLARDT.

1886. 35 *Minnesota*, 488.

IN each case the defendant Allardt appeals from an order of the municipal court of Minneapolis, refusing to open a judgment entered on default.

Bearnes & Marson, for appellant.

Henry M. Farnam, for respondents in the first case.

Chas. G. Van Wert, for respondents in the other cases.

VANDEBURGH, J. These cases all present substantially the same question. Judgment was obtained by default against the defendant upon a partnership indebtedness for goods sold to him and one Willard, associated together as partners in business. He claims to have been an infant when the debt was contracted, and when the judgment was rendered, but does not deny that the partnership incurred the indebtedness, or that the goods were received and are worth the sum claimed. After judgment a guardian *ad litem* was appointed for him in the several actions, and an application was duly made upon affidavits to set aside the judgment, and for leave to interpose an answer setting up defendant's alleged infancy in bar. The application was denied by the court, not on the ground that defendant was not shown to be an infant, which fact the court in its decision assumed to be true, but upon the merits of the plea; that is to say, the court held that, upon the admitted facts, infancy constitutes no bar to plaintiff's claim.

The action is an attempt to enforce a personal liability against the defendant, upon contract, for the price or value of goods sold to a partnership of which he was one of the members. We know of no reason why he may not, in such cases, interpose a plea of infancy in bar. *Conrad v. Lane*, 26 Minn. 389 (4 N. W. Rep. 695). The goods having been furnished to a partnership of which defendant was known to be a member, the court ruled that he was liable, on the ground, substantially, that by engaging in business as a member of the firm he held himself out as competent to bind himself by contract, and hence is estopped to set up his infancy as a sole defence. The rule is not, however, changed by the fact that he was a member of a partnership. His contracts are voidable, as in other cases. *Mason v. Wright*, 13 Met. 306; *Todd v. Clapp*, 118 Mass. 495; *Schouler*, Dom. Rel. §§ 424, 425. In *Kemp v. Cook*, 18 Md. 130, 138 (79 Am. Dec. 681), Lord Mansfield is quoted as having said in *Gibbs v. Merrill*, 3 Taunt. 307, "That an infant, by engaging in a partnership with an adult, holds himself out

fraudulently to the world ;” but we find no such language in the case referred to as applied to the infant partner. In some States the common-law rule is changed by statute, in order to protect persons dealing with infants under circumstances likely to induce the belief that they are over age. *Jaques v. Sax*, 39 Iowa, 367.

How far, or in what cases, an infant may or may not be bound by actual fraud, it is not necessary to consider here, since this case clearly falls within the rule laid down in *Conrad v. Lane*, *supra*. It would be a singular innovation upon the common-law rule if, in cases where his appearance and business were such as to induce the belief that he was over age, an infant would in consequence be held bound as though of full age. The hardships which may arise in particular cases must yield to the operation of a general rule, founded in public policy, intended to protect persons in fact under age from the danger of imprudent contracts. 2 Kent, Comm. *241.

The orders are reversed, and costs in this court fixed at \$10 in each case.¹

PAGE v. MORSE.

1880. 128 *Massachusetts*, 99.

CONTRACT on an account annexed, containing two items, one for 500 days' labor at one dollar per day, the other for \$100, money had and received.

At the trial in the Superior Court, before ALLEN, J., it appeared that the plaintiff, who was an infant, entered into partnership with the defendant, at the solicitation of the latter, in keeping a shop ; that they carried on the business from September, 1874 to April, 1876 ; and that the plaintiff put \$100 into the partnership as his share, and worked in the shop.

¹ Where, in a suit against two partners, for a partnership debt, one of them is discharged upon his plea of infancy, and judgment is taken against the adult partner, the judgment is still a partnership debt to which the partnership funds must be applied in preference to debt of the individual partners. *Gay v. Johnson*, 1855, 32 N. H. 167.

In England, under the Rules of Court adopted in 1891 (Order XLVIII. A.), any two or more persons claiming or being liable as co-partners “may sue or be sued in the name of the respective firms.” Where a partnership is composed of an adult and an infant, and an action is brought against the firm in the firm's name, if the defence of infancy is set up, judgment may be rendered against the firm in the firm's name excluding the infant partner : *i. e.* judgment against the firm of Beauchamp Brothers, “other than Gilbert Walter Beauchamp.” Bankruptcy proceedings may be had in conformity with the judgment. A receiving order may be made against the adult partner, and the receiver appointed under that order should also be appointed receiver of the partnership assets for the purpose of protecting them for the benefit of the partnership creditors. *Lovell v. Beauchamp*, L. R. (1894), Appeals, 607. See comments in 8 *Harvard Law Review*, 361. — Ed.

The plaintiff contended that the arrangement was that the defendant was to pay him a dollar a day independently of the partnership; and that, as a partner, he could now disaffirm the partnership, and, as a creditor, recover of the defendant what his services during the continuance of the partnership were fairly worth. The defendant denied that he ever agreed to pay the plaintiff one dollar a day; but contended that it was agreed that the plaintiff should be paid a dollar a day out of the partnership business; and that he was not liable in this action on a *quantum meruit* for services performed by the plaintiff for the partnership. There was evidence that the plaintiff's services were worth one dollar per day.

It appeared that the partnership matters were not settled; that the business had been sold out to one H. G. Wells, who gave a note payable to the defendant's order, (the reason for so making it payable being disputed,) and that this note, and also the books of the partnership, had since that time been in the possession of the plaintiff. The defendant testified that the plaintiff had always refused to let him take the books since the sale; and the plaintiff testified that he did once so refuse, but that at another time before the action was commenced he told him he might go up to his house and get them. The books and the note were produced at the trial by the plaintiff, he having had notice to produce the books. There was no other evidence of his disaffirmance of the partnership than his bringing the suit and saying in court that he disaffirmed it, and at the trial telling the defendant to take the books and note.

The plaintiff asked the judge to rule as follows: "If the plaintiff performed the labor at the instance of the defendant, he is entitled to recover whatever it was agreed between the parties he should have. If the plaintiff performed the labor, and there was not an absolute contract by the defendant to pay him for such services, he can recover as much as his services were fairly worth. If the defendant promised to pay the plaintiff a dollar a day out of the business, and the plaintiff performed the labor by reason thereof, the defendant is liable to the plaintiff in this action therefor. If the plaintiff paid into the business \$100 at the defendant's request, though put in by virtue of an agreement that he would share in the profits, yet, if the plaintiff has avoided the contract, he is a creditor of the defendant to that extent, and can recover what he has so paid."

The judge declined so to rule; but ruled that the plaintiff could recover for his labor only in case the jury found that the defendant absolutely promised to pay him at all events; and that the plaintiff could not recover any money put into the business under an agreement to share in the profits.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

T. G. Spaulding, (*W. G. Bassett* with him,) for the plaintiff.

H. H. Bond, for the defendant.

GRAY, C. J. This is not a case in which an infant plaintiff has paid money or delivered property to the defendant or performed services for him. It does indeed appear that the plaintiff entered into partnership with the defendant at the solicitation of the latter in the business of keeping a shop, that they carried on the partnership for a year and seven months during the plaintiff's minority, and that he worked in the shop. As to the sum of one hundred dollars which the plaintiff seeks to recover back, the bill of exceptions merely states that he put it into the partnership; there is nothing to show that it was ever in the separate hand or control of the defendant, and it must therefore be taken to have been, like other property of the partnership, in the possession of the two jointly; and its expenditure or loss in the course of the partnership business does not render the defendant liable to make it good to the plaintiff. *Moley v. Brine*, 120 Mass. 324. So the work done by the plaintiff, having been done for the partnership and not for the defendant alone, no promise of the latter to pay the plaintiff for it can be implied, and the jury have negatived any express promise to pay him. Exceptions overruled.

SHIRK v. SHULTZ.

1888. 113 *Indiana*, 571.

FROM the Decatur Circuit Court.

J. K. Ewing and *C. Ewing, Jr.*, for appellant.

J. D. Miller and *F. E. Gavin*, for appellee.

ZOLLARS, J. Appellant alleges in his complaint that, in October, 1884, when he was a minor, he entered into partnership with appellee for an indefinite time, in the business of upholstering and dealing in furniture, under the firm name of Shirk & Shultz; that he still is a minor; that he invested in the business \$500; that the firm has on hand furniture and goods of the value of \$850, and is in debt over \$600; that "he is advised by his guardian to renounce such partnership and withdraw from said firm, and he hereby renounces such arrangement and asks to avoid, annul, and undo all of his obligations in that behalf;" that Shultz is insolvent, and that the firm creditors will exhaust the assets of the firm unless a receiver shall be appointed to take charge of them, etc.

The prayer is for the appointment of a receiver to take charge of the assets of the firm, and convert them into money, and pay, first, to appellant the amount invested by him, and second, the firm debts.

The court made a special finding of facts, in substance, that, in October, 1884, Shirk and Shultz entered into partnership and continued in business until the commencement of this action, in August, 1885. Shirk is a minor and has a guardian. He entered into the partnership

and put into the business \$271.40 with the consent of his guardian. Of that amount \$74.50 was paid to Shultz to be used in the purchase of goods for the firm, and it was so used. The balance of the \$271.40 was paid by Shirk on debts of the firm, for goods and labor of employees.

During the existence of the firm, Shirk drew out \$100. Shultz put into the business \$260 and drew out nothing. The assets of the firm, at the time this suit was commenced, amounted in value to \$800, and its debts aggregated \$700. Shultz is insolvent.

Upon the facts so found, the court below concluded as a matter of law, that the firm should be dissolved, and that a receiver should be appointed to take charge of the firm assets, convert them into money, and pay, first, the costs of this suit, second, the firm debts, and third, divide the surplus, if any, between the partners. A receiver was accordingly appointed.

Appellant excepted to the conclusions of law and contended, and still contends, that, upon the facts found by the court, he is entitled to have refunded to him from the assets of the firm the amount which he invested, in preference to the partnership creditors and all others. Whether or not he is so entitled is the one question for decision.

[After stating *Dunton v. Brown*, 31 Mich. 182; *Bush v. Linthicum*, 59 Maryland, 344; *Kitchen v. Lee*, 11 Paige Chan. 107; and other cases.]

It will be observed that the decision in the Michigan case, above cited, is based upon the proposition that an infant cannot disaffirm a partnership agreement during his minority. The reasoning in that case was adopted in the Maryland case.

The decision in the case of *Kitchen v. Lee*, *supra*, was based largely upon the proposition that an infant cannot be permitted to retain the property purchased by him, and at the same time repudiate the contract upon which he purchased it.

It may be said of most, if not of all, the propositions upon which the decisions in the cases cited are based, that they have not been regarded as the law in this State. We have stated them for the purpose of determining whether or not the conclusions in those cases may be regarded as correct, notwithstanding the propositions upon which they rest may be regarded as incorrect.

The holdings of this court have been, that all voidable contracts by an infant in relation to personal property may be disaffirmed by him during minority. *Carpenter v. Carpenter*, 45 Ind. 142; *Indianapolis Chair Manuf. Co. v. Wilcox*, 59 Ind. 429, and cases there cited; *Ayers v. Burns*, 87 Ind. 245, and cases there cited; *Rice v. Boyer*, 108 Ind. 472, and cases there cited, including cases by the Supreme Courts of Vermont, Massachusetts, and New York.

In support of the right of infants to disaffirm such contracts during minority, see, also, *Tyler Infancy* (2d ed.), pp. 70 and 72, and cases there cited: *Schouler, Domestic Relations*, section 409; *Lindley, Partnership*, star p. 83.

The Supreme Court of Maryland, since the case above cited from that court, has held that an infant may thus disaffirm during minority. *Adams v. Beall*, 7 Central Rep. 430. And so it has been the holding of this court, that in order to disaffirm and maintain an action during minority for his property, or for money paid on a voidable contract, it is not necessary for the infant to return what he has received, or to place the other party *in statu quo*. *Pitcher v. Laycock*, 7 Ind. 398, and cases there cited; *Miles v. Lingerman*, 24 Ind. 385; *Briggs v. McCabe*, 27 Ind. 327 (89 Am. Dec. 503); *Towell v. Pence*, 47 Ind. 304; *Carpenter v. Carpenter*, *supra*; *White v. Branch*, 51 Ind. 210.

The statute of 1881 has changed the rule as to real estate, but that change is not material here. Section 2945, R. S. 1881.

And so, upon ample authority, this court has repudiated the doctrine that "If an infant advances money on a voidable contract which he afterwards rescinds, he cannot recover this money back, because it is lost to him by his own act, and the privilege of infancy does not extend so far as to restore this money unless it was obtained from him by fraud." *House v. Alexander*, 105 Ind. 109, and cases there cited.

The cases thus reviewed lend aid to the proposition that in the case before us appellant cannot, through the instrumentality of the court, exercising equitable powers, and the receiver appointed by it, have the assets of the firm appropriated in the way of refunding to him what he invested in the business, and thus leave the firm creditors wholly or partially unpaid. And, so far as they sustain that proposition, we approve of them, although disapproving, in the main, the reasoning upon which they rest.

Had appellant purchased the goods on his own account, and paid for them, he might have disaffirmed the contract and recovered the amount paid, without first returning or offering to return them to the person from whom he purchased them. It does not follow from that, however, that after having thus disaffirmed the contract, he could, nevertheless, hold the goods as against the person from whom the purchase was made. He would not be allowed to retain the goods after having thus recovered what he paid for them.

When an infant thus repudiates a contract, he repudiates it for all purposes. He cannot repudiate it so as to escape payment for an article purchased, and still hold the article as against the person from whom the purchase was made. As was said in the case in *Paige*, *supra*, when a contract is thus repudiated, the vendor may have his action to recover the goods from the infant if they remain in his hands unchanged. And so, if appellant had purchased the goods on his own account, he might have disaffirmed the contract and refused to pay for them without returning or offering to return them to the vendor. But after having thus disaffirmed the contract, and refused to pay, he could not hold the goods as against the vendor. See *Kitchen v. Lee*, *supra*; *Rice v. Boyer*, 108 Ind. 472.

What he could not do otherwise, he certainly cannot accomplish

through a court of equity. Having gone into court, and asked that the assets of the firm should be taken charge of by it, through a receiver, he must be held to have consented that the court shall deal with them and the rights of all concerned as the law and equity may require. Having thus invoked the interposition of the court, he must be held to have consented that it shall close out the business so as to settle the ultimate rights of the parties. If it be said that his disaffirmance of the contract is such as would otherwise have relieved him from the obligation to pay for the goods, then the court having charge of the goods has the right to see to it that they, or the money that may be realized from the sale of them, shall be returned to the vendor.

In our judgment, however, appellant's course has been such as to ratify the purchase of the goods and all that has been done by the firm. He states in his bill that he "renounces the partnership arrangement, and asks to avoid and annul all of his obligations in that behalf," but, at the same time, he treats the goods and assets on hand as partnership assets, and asks the court to take charge of and deal with them as such. His disaffirmance puts an end to the contract by which he became a member of the firm, but by asking the court to take charge of the goods as assets of the firm, as to them, he not only does not disaffirm, but ratifies all that was done in the purchase of them. As to them, he cannot disaffirm and at the same time treat them as partnership assets. Having treated them as assets of the firm by asking the court to deal with them as such, the court will deal with them as partnership assets, as in any other case, and apply them first to the payment of the debts of the firm. 2 Lindley, Partnership, star p. 1040.

This is not an action against the other partner to recover a personal judgment against him for the amount paid into the business by appellant. What might be the rights of the parties in such an action we do not decide. It is sufficient here, that, in our judgment, the conclusions of law by the court below, upon the facts found, were correct, and the proper decree was entered.

Judgment affirmed, with costs.

SECTION IV.

Acts done at Infant's request, or upon Infant's authority.

WELCH v. WELCH.

1870. 103 *Massachusetts*, 562.

CONTRACT for money had and received by the defendant to the plaintiff's use. Writ dated December 6, 1867. At the trial in the Superior Court, before ROCKWELL, J., it was agreed by the parties, (who were brothers,) that the plaintiff, in August, 1852, being then under full age, enlisted into the military service of the United States, and the United States paid to the mayor of Lowell, on account of the enlistment, \$95; that the mayor, by direction of the plaintiff, paid this money over to the defendant during that month; and that the father of the parties was living at the time in Lowell. The defendant then offered to prove that he received the money under an agreement with the plaintiff that it should be used for the support of their father and his family, if necessary; that he did so use the money, it being necessary; that their father had no means of support, and was sick, and died during the month; and that the money was spent in defraying the funeral expenses, and supporting their mother afterwards. But the judge excluded the evidence, "upon the ground that said agreement was voidable, and that the plaintiff, on arriving at full age, might well maintain this action, even though said evidence was true;" and, after a verdict for the plaintiff, reported the case for the revision of this court.

R. B. Caverly, for the plaintiff.

J. C. Kimball & H. W. Boardman, for the defendant.

COLT, J. The evidence offered by the defendant was rejected by the court on the ground that it only proved an agreement which the plaintiff might avoid by bringing his action to recover the money on reaching his majority.

It has been held that the indorsement by an infant payee of a note cannot be set aside by him as void, so as to give him a right to recover of the maker, who has paid the indorsee before notice that the order of payment is countermanded; and for the reason that the transaction has become executed in favor of his appointee, and cannot be opened without reinstating the maker. "It would be absurd," says Parker, C. J., in *Nightingale v. Withington*, 15 Mass. 272, 274, "to allow one, who has made a promise to pay to one who is an infant or his order, to refuse to pay the money to one to whom the infant had ordered it to be paid, in direct violation of his promise." Whether an infant may avoid an indorsement, or an order to pay money belonging

to him, to a third person, before the order is executed, is another question.

The money which was paid by the plaintiff's direction to the defendant, in the present case, was paid on account of the plaintiff's enlistment in the military service of the United States, and belonged to him, and not to his father. *Taylor v. Mechanics' Savings Bank*, 97 Mass. 345. The defendant offered to prove that the money was received by him upon an agreement with the plaintiff that it should be used, if necessary, for the support of the plaintiff's father and family, and that it was so used. This evidence ought to have been received. It proved an executed agency; a payment by the infant's direction which cannot, for the reasons suggested, be avoided in this action.

Verdict set aside.

SECTION V.

Where Infant seeks to recover Money paid by him for Benefits of a Continuous Nature; and which, so far as they have actually been received, it is impossible to restore.

HOLMES v. BLOGG.

1818. 8 Taunton, 508.¹

ASSUMPSIT to recover money paid to defendant by plaintiff, during his infancy.

In March, 1816, plaintiff entered into partnership with Taylor, an adult. For the purpose of carrying on the business, the partner took a lease of certain premises from the defendant. Part of the consideration for the lease was paid down, and security was given for the residue. The money so paid down (and to recover which this action was brought) was the money of the plaintiff, and was paid down by him. Plaintiff became of age in June, 1816, and on the day following dissolved the partnership with Taylor. Plaintiff never slept in the house after he became of age.

The jury having found for the plaintiff, a rule *nisi* was obtained; Burrough, J., having reserved the question whether the action was maintainable.

Best, Serjt., showed cause.

Copley, Serjt., in support of the rule.

Cur. adv. vult.

GIBBS C. J. . . . The infant avoided the lease when he came of age, as he had a right to do; and, having avoided the lease, he

¹ Statement compiled from above report, and from 8 Taunton, 35. Arguments omitted. — Ed.

brought this action for the money paid to the defendant, on the ground that the consideration having failed, he was entitled to recover it. There has been a good deal of argument on the subject of this avoidance, and, indeed, it has been treated as the main question: but another question arises, namely, whether, supposing the lease to have been avoided, the plaintiff could recover the money which he has paid for it during his infancy. I confess this action is quite new to me, and I thought, on principle, that it could not be maintained. I thought, too, that there was much in my Brother Copley's argument, that the money paid could not be taken to be the money of the infant alone, but that it must be taken to be the joint money of the infant and Taylor; and that, if it was paid as their joint money, it would be money advanced by Holmes in the first instance to the partnership of Holmes and Taylor, and then paid as partnership money by them to Blogg. But I think further, that, supposing this money to be the sole property of the infant, he cannot recover. He may, it is true, avoid the lease; he may escape the burthen of the rent, and avoid the covenants; but that is all he can do. He cannot, by putting an end to the lease, recover back any consideration which he has paid for it. the law does not enable him to do that. I cannot find this decided; for I cannot find that any such action as this has ever been brought; but Lord Mansfield has incidentally said that such an action cannot be brought. In the famous case of *Drury v. Drury*, 2 Eden. 39, one of the questions was, whether an infant could, by contract, bar her dower. Lord Northington thought that the statute applied only to adults; and the marriage of Lady Drury with the Earl of Buckinghamshire took place on his opinion: but the case afterwards came before the House of Lords upon appeal, under the name of *The Earl of Buckinghamshire v. Drury*, Wilmot's Notes of Opinions and Judgments, 177; S. C. 3 Brown, Parl. Ca., 492, 2d ed. S. C. 2 Eden. 60, when the decree of Lord Northington as to this point was reversed. Lord Mansfield there said, in delivering his opinion, "If an infant pays money with his own hand without a valuable consideration for it, he cannot get it back again." 2 Eden. 72. What is the point here? That an infant, having paid money on a valuable consideration, and having partially enjoyed the consideration, seeks to receive it back. But the authority does not altogether stop here. In Lord Chief Justice Wilmot's Notes of Opinions and Judgments, 226, it appears that Lord Hardwicke and Lord Mansfield were of opinion with the majority of the judges; in which majority the learned author, then Mr. Justice Wilmot, was. His note of Lord Mansfield's judgment on this point is in these words: "If an infant pays money with his own hand without a valuable consideration, he cannot get it back again." Wilmot's Notes, 226. n. So that Lord Chief Justice Wilmot had himself taken a note of this declaration of Lord Mansfield, and laid it up among his *memoranda*, without any expression of disapprobation. He must, therefore, be taken to have adopted it.

We, therefore, think that this action cannot be maintained, upon the ground that the infant, having paid the money with his own hand, cannot recover it back again.

The other ground taken by my Brother Copley, namely, that this was the money of the partnership, my Brother Burrough tells me was not taken at *Nisi Prius*. We do not, therefore, decide on that ground.

*Rule absolute for a nonsuit.*¹

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VALENTINI v. CANALI. ★

1889. *Law Reports*, 24 *Queen's Bench Division*, 167.²

APPEAL from the Woolwich County Court in an action remitted for trial from the Chancery Division in which the plaintiff claimed a declaration that a contract by which he agreed with the defendant to become tenant of a house, and to pay £102 for the furniture therein, was void, and the return of £68 paid by him on account, on the ground that he was an infant at the time when he entered into the contract. It appeared that the plaintiff had occupied the premises and used the furniture for some months.

[The contract was made August 15, 1888. In September, 1888, plaintiff paid the rent accrued since he had taken possession; but he was in default in December when the defendant distrained. In January, 1889, plaintiff left the premises and commenced the present proceeding.]

The judge found in the plaintiff's favour on the issue of infancy, declared the contract to be void, and ordered a promissory note given by the plaintiff for the balance due for the furniture to be cancelled, but refused to order the return of the sum paid. The plaintiff appealed.

J. R. Paget, for the plaintiff. By s. 1 of the Infants' Relief Act, 1874, "contracts entered into by infants for goods supplied" are declared to be "absolutely void." It is submitted that the effect of the section is to entitle the plaintiff to recover back money paid by him under a contract which has been pronounced void as upon a complete failure of consideration. [The agreement for the lease was separate from and independent of the contract for the purchase of the goods. This money was paid by the plaintiff as purchase-money of goods and shop-fittings for business purposes, and not in any way as premium for the lease. The defendant has received back again under his distress the consideration for the payment of the money now claimed by the plaintiff. He had at the time no right to rent, for an infant is not liable to pay rent for premises held by him for the purposes of trade. (*Per*

¹ DALLAS, J., who was absent on account of illness, concurred in this judgment. *Ex relatione* GIBBS, C. J.

² Passages in brackets [] are taken from the report of this case in 59 *Law Journal*, New Series, *Queen's Bench*, 74. — ED.

CURIAM. The point as to the plaintiff's liability for rent was not taken at the trial.)]

H. A. Forman, for the defendant, was not heard.

LORD COLERIDGE, C. J. I am of opinion that this appeal should be dismissed. Under the contract in question, which was one for his advantage, the plaintiff, an infant, undertook to pay the defendant a sum of money. He paid the defendant part of this sum, and gave him a promissory note for the balance. The judge satisfied himself that the plaintiff was an infant at the time when he entered into the contract, and, having satisfied himself of this, did, in my opinion, justice according to law. He set aside the contract, and he ordered the promissory note to be cancelled.

It is now contended that, in addition to this relief, the plaintiff was entitled to an order for the re-payment of the sum paid by him to the defendant as money paid under a contract declared to be void. No doubt the words of s. 1 of the Infants' Relief Act, 1874, are strong and general, but a reasonable construction ought to be put upon them. The construction which has been contended for on behalf of the plaintiff would involve a violation of natural justice. [I think that the old rule of law on this point was just, and that it has not been altered by the Act. That rule was, that where an infant had received something for which he had given consideration, if he was unable to return that for which the consideration had passed, he could not recover the consideration.] When an infant has paid for something and has consumed or used it, it is contrary to natural justice that he should recover back the money which he has paid. Here the infant plaintiff who claimed to recover back the money which he had paid to the defendant had had the use of a quantity of furniture for some months. He could not give back this benefit or replace the defendant in the position in which he was before the contract. The object of the statute would seem to have been to restore the law for the protection of infants upon which judicial decisions were considered to have imposed qualifications. The Legislature never intended in making provisions for this purpose to sanction a cruel injustice. The defendant therefore could not be called upon to repay the money paid to him by the plaintiff, and the decision appealed against is right.

BOWEN, L. J., concurred.

Appeal dismissed.

JOHNSON v. NORTHWESTERN M. L. INS. CO.

1894. 56 *Minnesota*, 365.

APPEAL by the defendant, the Northwestern Mutual Life Insurance Company, from an order of the District Court of Hennepin County,

SEAGRAVE SMITH, J., made August 16, 1893, overruling its demurrer to the complaint.

On October 25, 1888, the defendant insured the life of the plaintiff, Martin C. Johnson, then of Stoughton, Wis., in the sum of \$1,000. By its policy it agreed to pay him that sum twenty years thereafter, or in case of his death meantime to pay it to his representatives or assigns sixty days after due proof of his decease. After ten years he was to share in the surplus profits of the company arising from the policy. After three or more annual premiums were paid he was entitled to a paid up non-participating policy for as many twentieth parts of the \$1,000 as he had paid annual premiums. He paid \$23.29 on that date, and agreed to pay a like sum every six months thereafter. He was then but seventeen years of age. He paid seven of these semi-annual instalments, in all \$186.32. On December 19, 1892, immediately after he became of age, he served written notice on the Insurance Company that he elected to avoid the policy, and offered to return it, and demanded a return of the money he had paid. It was not repaid, and he soon after brought this action to recover it. His complaint stated these facts, and a copy of the policy was attached. Defendant demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and defendant appeals.

Lusk, Bunn, & Hadley, for appellant.

The only void contracts of infants are appointments of attorney, their other contracts being only voidable. 1 Am. Lead. Cas. (5th ed.) *244. Infants' contracts are of three classes: Valid as for necessities; voidable (or more accurately, rescindable) where there is a benefit to the infant and no fraud, advantage, or unfairness; void where there is fraud or unfairness, or the contract is a power of attorney. This contract is clearly of the second class. A contract not void, but rescindable. It was partly executed on both sides by the voluntary payment of money on the infant's part, by carrying the risk of his life four years on the company's part. This was a benefit of value received by the infant and which cannot be restored. He does not offer in his complaint, or otherwise, to restore it. Had he died during these four years the company must have paid its policy. He has a right now to receive a paid-up policy for four-twentieths of the total insurance, the same as an adult. The precise question is this: When the infant has voluntarily paid money and received a consideration under a contract executed on both sides, can he recover the money without returning what he received? Infants buy and pay cash for all imaginable property not necessities. Is the law such that they can, on reaching majority, recover back all the money they have paid without returning the property? Such a result would shock the moral sense, and would be against the common understanding of the business world. This case is not one where the infant is sued, as where he buys property and gives his note. There he may defend his note. He is only using his privilege as a

shield. But here he is in court as plaintiff to recover back, by the aid of a court, what he has paid, without rendering what he has received. He is using his privilege as a sword. The English cases without variation hold that he cannot recover unless he returns what he received. *Holmes v. Blogg*, 8 Taunt. 508; *Corpe v. Overton*, 10 Bing. 252; *Ex parte Taylor*, 8 DeG., M. & G. 254; *Valentini v. Canali*, 24 Q. B. Div. 166.

Mr. Chitty lays down the same rule in 1 Chitty, Cont. 222. Mr. Leake, in his work on contracts, page 553, does the same.

In this country, Chancellor Kent states the law exactly as it is in England. 2 Kent, Comm. 240. Mr. Parsons undoubtedly states the law too broadly, 1 Parsons, Cont. 322, by omitting the qualification of Kent, "and enjoys the benefit of it."

We think the statement of the law by Chancellor Kent is supported by the large weight of authority in this country. Though some courts seeing the error of Mr. Parson's statement and of some obiter remarks of Gibbs, C. J., in *Holmes v. Blogg*, have carelessly said that case was overruled, and have gone as far wrong as Mr. Parsons, but in the opposite direction. *Riley v. Mallory*, 33 Conn. 201; *Shurtleff v. Mil-lard*, 12 R. I. 272; *Adams v. Beall*, 67 Md. 53; *Sparman v. Keim*, 83 N. Y. 245.

Suppose an infant works at agreed wages one year for an adult, which wages are paid, can the infant retaining the wages recover the full value of his services again on a *quantum meruit*? That is this case. No court ever has or ever will outrage common sense by pushing the rights of an infant so far. *Breed v. Judd*, 1 Gray, 455.

Where an infant has deeded real estate for money paid, it seems there may be an exception to this rule. *Chandler v. Simmons*, 97 Mass. 508; *Dawson v. Helmes*, 30 Minn. 107.

In equity an infant suing to rescind must do equity by returning the consideration. *Hillyer v. Bennett*, 3 Edw. Ch. 222; *Kitchen v. Lee*, 11 Paige, 107; *Ottman v. Moak*, 3 Sandf. Ch. 431. It is impossible to give any reason why a different rule should apply at law, when the infant is plaintiff. The old common law rule is that the infant can use his privilege as a shield, not as a sword. *Chicago Mut. Life Ins. Ass'n v. Hunt*, 127 Ill. 257.

Freeman P. Lane and *Wm. H. Briggs*, for respondent.

[Argument omitted.]

[February 1, 1894, BUCK, J., gave an opinion in favor of the respondent; and the order appealed from was affirmed.]

May 7, 1894, the case was reargued; and the following opinions were given July 10, 1894.]

MITCHELL, J. This case was argued and decided at the last term of this court. A reargument was granted for the reasons that, although the amount was small, the legal principles involved were important; the time permitted for argument under our rules was brief; the case was decided near the end of the term, without, perhaps, the degree of

consideration that its importance demanded; and, on further reflection, we are not satisfied that our decision was correct.

The former opinion laid down the following propositions, to which we still adhere: (1) That the contract of insurance was of benefit to the infant himself, and was not a contract for the benefit of third parties. (2) The contract, so far as appears on its face, was the usual and ordinary one for life insurance, on the customary terms, and was a fair and reasonable one, and free from any fraud, unfairness, or undue influence on part of the defendant, unless the contrary is to be presumed from the fact that it was made with the infant.

It is not correct, however, to say that the plaintiff has received no benefit from the contract, or that the defendant has parted with nothing of value under it. True, the plaintiff has received no money, and the defendant has paid none to the plaintiff; but the life of the former was insured for four years, and if he had died during that time the defendant would have had to pay the amount of the policy to his estate. The defendant carried the risk all that time, and this is the essence of the contract of insurance. Neither does it follow that the risk has cost the defendant nothing in money because plaintiff himself was not one of those insured who died. The case is, therefore, one of a voidable or rescindable contract of an infant, partly performed on both sides, the benefits of which the infant has enjoyed, but which he cannot return, and where there is no charge of fraud, unfairness, or undue influence on the part of the other party, unless, as already suggested, it is to be presumed from the fact that the contract was made with an infant.

The question is, can the plaintiff recover back what he has paid, assuming that the contract was in all respects fair and reasonable? The opinion heretofore filed held that he can. Without taking time to cite or discuss any of our former decisions, it is sufficient to say that none of them commit this court to such a doctrine. That such a rule goes further than is necessary for the protection of the infant, and would often work gross injustice to those dealing with him, is, to our minds, clear. Suppose a minor engaged in agriculture should hire a man to work on his farm, and pay him reasonable wages for his services. According to this rule the minor might recover back what he paid, although retaining and enjoying the fruits of the other man's labor. Or, again, suppose a man engaged in mercantile business, with a capital of \$5,000, should, from time to time, buy and pay for \$100,000 worth of goods, in the aggregate, which he had sold, and had got his pay. According to this doctrine, he could recover back the \$100,000 which he had paid to the various parties from whom he had bought the goods. Not only would such a rule work great injustice to others, but it would be positively injurious to the infant himself. The policy of the law is to shield or protect the infant, and not to debar him from the privilege of contracting.

But, if the rule suggested is to obtain, there is no footing on which an adult can deal with him, except for necessities. Nobody could or

would do any business with him. He could not get his life insured. He could not insure his property against fire. He could not hire servants to till his farm. He could not improve or keep up his land or buildings. In short, however advantageous other contracts might be to him, or however much capital he might have, he could do absolutely nothing, except to buy necessities, because nobody would dare to contract with him for anything else. It cannot be that this is the law. Certainly, it ought not to be.

The following propositions are well settled, everywhere, as to the rescindable contracts of an infant, and in that category we include all contracts except for necessities :

First. That, in so far as the contract is executory on part of an infant, he may always interpose his infancy as a defence to an action for its enforcement. He can always use his infancy as a shield.

Second. If the contract has been wholly or partly performed on his part, but is wholly executory on part of the other party, the minor having received no benefits from it, he may recover back what he has paid or parted with.

Third. Where the contract has been wholly or partly performed on both sides, the infant may always rescind, and recover back what he has paid, upon restoring what he has received. (if he has it)

Fourth. A minor, on arriving at full age, may avoid a conveyance of his real estate without being required to place the grantee in *statu quo*, although a different rule has sometimes been adopted by courts of equity when the former infant has applied to them for aid in avoiding his deeds. Whether this distinction between conveyances of real property and personal contracts is founded on a technical rule, or upon considerations of policy growing out of the difference between real and personal property, it is not necessary here to consider.

Fifth. Where the contract has been wholly or partly performed on both sides, the infant, if he sues to recover back what he has paid, must always restore what he has received, in so far as he still retains it in specie.

Sixth. The courts will always grant an infant relief where the other party has been guilty of fraud or undue influence. As to what would constitute a sufficient ground for relief under this head, and what relief the courts would grant in such cases, we will refer to hereafter.

But suppose that the contract is free from all elements of fraud, unfairness, or overreaching, and the infant has enjoyed the benefits of it, but has spent or disposed of what he has received, or the benefits received are, as in this case, of such a nature that they cannot be restored. Can he recover back what he has paid? It is well settled in England that he cannot. This was held in the leading case of *Holmes v. Blogg*, 8 Taunt. 508, approved as late as 1890 in *Valentini v. Canali*, 24 Q. B. Div. 166. Some obiter remarks of the chief-justice in *Holmes v. Blogg*, to the effect that an infant could never recover back money voluntarily paid, were too broad, and have often been disapproved, — a

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fact which has sometimes led to the erroneous impression that the case itself has been overruled. *Corpe v. Overton*, 10 Bing. 252 (decided by the same court), held that the infant might recover back what he had voluntarily paid, but on the ground that the contract in that case remained wholly executory on part of the other party, and hence the infant had never enjoyed its benefits.

In Chitty on Contracts (volume 1, p. 222), the law is stated in accordance with the decision in *Holmes v. Blogg*. Leake, — a most accurate writer, — in his work on Contracts (page 553), sums up the law to the same effect. In this country, Chancellor Kent (2 Kent, Comm. 240), and Reeves, in his work on Domestic Relations (chapters 2 and 3, tit. "Parent and Child"), state the law in exact accordance with what we may term the "English rule." Parsons, in his work on Contracts (volume 1, p. 322), undoubtedly states the law too broadly, in omitting the qualification, "and enjoys the benefit of it."

At least a respectable minority of the American decisions are in full accord with what we have termed the "English rule." See, among others, *Riley v. Mallory*, 33 Conn. 206; *Adams v. Beall*, 67 Md. 53 (8 Atl. 664); *Breed v. Judd*, 1 Gray, 455. But many — perhaps a majority — of the American decisions, apparently thinking that the English rule does not sufficiently protect the infant, have modified it; and some of them seem to have wholly repudiated it, and to hold that, although the contract was in all respects fair and reasonable, and the infant had enjoyed the benefits of it, yet if the infant had spent or parted with what he had received, or if the benefits of it were of such a nature that they could not be restored, still he might recover back what he had paid. The problem with the courts seems to have been, on the one hand, to protect the infant from the improvidence incident to his youth and inexperience, and how, on the other hand, to compel him to conform to the principles of common honesty. The result is that the American authorities — at least the later ones — have fallen into such a condition of conflict and confusion that it is difficult to draw from them any definite or uniform rule.

The dissatisfaction with what we have termed the "English rule" seems to be generally based upon the idea that the courts would not grant an infant relief, on the ground of fraud or undue influence, except where they would grant it to an adult on the same grounds, and then only on the same conditions. Many of the cases, we admit, would seem to support this idea. If such were the law, it is obvious that there would be many cases where it would furnish no adequate protection to the infant. Cases may be readily imagined where an infant may have paid for an article several times more than it was worth, or where the contract was of an improvident character, calculated to result in the squandering of his estate, and that fact was known to the other party; and yet if he was an adult the court would grant him no relief, but leave him to stand the consequences of his own foolish bargain. But to measure the right of an infant in such cases by the same rule that

would be applied in the case of an adult would be to fail to give due weight to the disparity between the adult and the infant, or to apply the proper standard of fair dealing due from the former to the latter. Even as between adults, when a transaction is assailed on the ground of fraud, undue influence, etc., their disparity in intelligence and experience, or in any other respect which gives one an ascendancy over the other, or tends to prevent the latter from exercising an intelligent and unbiased judgment, is always a most vital consideration with the courts. Where a contract is improvident and unfair, courts of equity have frequently inferred fraud from the mere disparity of the parties.

If this is true as to adults, the rule ought certainly to be applied with still greater liberality in favor of infants, whom the law deems so incompetent to care for themselves that it holds them incapable of binding themselves by contract, except for necessities. In view of this disparity of the parties, thus recognized by law, every one who assumes to contract with an infant should be held to the utmost good faith and fair dealing. We further think that this disparity is such as to raise a presumption against the fairness of the contract, and to cast upon the other party the burden of proving that it was a fair and reasonable one, and free from any fraud, undue influence, or overreaching.

A similar principle applies to all the relations where, from disparity of years, intellect, or knowledge, one of the parties to the contract has an ascendancy which prevents the other from exercising an unbiased judgment, — as, for example, parent and child, husband and wife, guardian and ward. It is true that the mere fact that a person is dealing with an infant creates no “fiduciary relation” between them, in the proper sense of the term, such as exists between guardian and ward; but we think that he who deals with an infant should be held to substantially the same standard of fair dealing, and be charged with the burden of proving that the contract was in all respects fair and reasonable, and not tainted with any fraud, undue influence, or overreaching on his part. Of course, in this as in all other cases, the degree of disparity between the parties, in age and mental capacity, would be an important consideration. Moreover, if the contract was not in all respects fair and reasonable, the extent to which the infant should recover would depend on the nature and extent of the element of unfairness which characterized the transaction.

If the party dealing with the infant was guilty of actual fraud or bad faith, we think the infant should be allowed to recover back all he had paid, without making restitution, except, of course, to the extent to which he still retained in specie what he had received. Such a case would be a contract essentially improvident, calculated to facilitate the squandering the infant's estate, and which the other party knew, or ought to have known, to be such, for to make such a contract at all with an infant would be fraud. But if the contract was free from any fraud or bad faith, and otherwise reasonable, except that the price paid by the infant was in excess of the value of what he received, his re-

covery should be limited to the difference between what he paid and what he received. Such cases as *Medbury v. Watrous*, 7 Hill, 110; *Sparman v. Keim*, 83 N. Y. 245; and *Heath v. Stevens*, 48 N. H. 251, — really proceed upon this principle, although they may not distinctly announce it. The objections to this rule are, in our opinion, largely imaginary, for we are confident that in practice it can and will be applied by courts and juries so as to work out substantial justice.

Our conclusion is that where the personal contract of an infant, beneficial to himself, has been wholly or partly executed on both sides, but the infant has disposed of what he has received, or the benefits recovered by him are such that they cannot be restored, he cannot recover back what he has paid, if the contract was a fair and reasonable one, and free from any fraud or bad faith on part of the other party, but that the burden is on the other party to prove that such was the character of the contract; that, if the contract involved the element of actual fraud or bad faith, the infant may recover all he paid or parted with, but if the contract involved no such elements, and was otherwise reasonable and fair, except that what the infant paid was in excess of the value of what he received, his recovery should be limited to such excess. It seems to us that this will sufficiently protect the infant, and at the same time do justice to the other party. Of course, in speaking of contracts beneficial to the infant, we refer to those that are deemed such in contemplation of law.

Applying these rules to the case in hand, we add that life insurance in a solvent company, at the ordinary and usual rates, for an amount reasonably commensurate with the infant's estate, or his financial ability to carry it, is a provident, fair, and reasonable contract, and one which it is entirely proper for an insurance company to make with him, assuming that it practises no fraud or other unlawful means to secure it; and if such should appear to be the character of this contract the plaintiff could not recover the premiums which he has paid in, so far as they were intended to cover the current annual risk assumed by the company under its policy.

But it appears from the face of the policy that these premiums covered something more than this. The policy provides that after payment of three or more annual premiums the insured will be entitled to a paid-up, non-participating policy for as many twentieths of the original sum insured (\$1,000) as there have been annual premiums so paid. The complaint alleges the payment of four annual premiums. Hence, the plaintiff was entitled, upon surrender of the original policy, to a paid-up, non-participating policy for \$200; and it therefore seems to us that, having elected to rescind, he was entitled to recover back, in any event, the present cash "surrender" value of such a policy. For this reason, as well as that the burden was on the defendant to prove the fair and honest character of the contract, the demurrer to the complaint was properly overruled. The result arrived at in the former opinion was therefore correct, and is adhered to, although on somewhat different grounds.

Order affirmed.

BUCK, J., absent, sick, took no part.


GILFILLAN, C. J. I dissent, and especially from the proposition that in any case the contract of a minor is presumed to be fraudulent on the part of the other party to it. If two minors contract together, each may avoid the contract. Is that because each is presumed to have fraudulently drawn the other into making it? If a contract be wholly executory when the minor seeks to avoid it, will any amount of proof that it is advantageous to him, and made in good faith and honesty on the part of the adult, prevent the minor avoiding it? If wholly executory when made, will the subsequent performance raise a presumption that it was fraudulent when made?

A minor's contract, except for necessities, is voidable by him only because he is, in law, incapable to bind himself. When he seeks to avoid a contract the question arises, on what conditions shall he do so? In such cases there are two considerations: *First*, to afford him full protection from the consequences of his own incapacity; *second*, that being done, to prevent him making his legal incapacity a means to defraud others.

If the contract be wholly executory, both ends will be attained by allowing him to repudiate it, which will leave both parties as they were before it was made. But suppose it partly performed on both sides? He may undoubtedly avoid further performance. But if he takes the aggressive, and seeks to recover what he has parted with in performance, what then? The authorities are agreed that, if he have in specie what he received under it, he must restore it, as a condition of recovering what he parted with. The disagreement in the authorities is in cases where he cannot restore the benefits he has received; where he has expended them, or they are of such a character that they cannot be restored. I am speaking only of contracts relating to the personality.

Since the first argument of this cause, I have come to the conclusion that whether, when he cannot restore what he has received, he may recover what he has parted with, will depend on the character of the contract. If, from the subject-matter or terms of the contract, it is a wasting of his estate, so that to require him to restore what he has received will likewise waste his estate, it will not be required of him. But if the contract be, both in subject-matter and terms, a provident one, — advantageous to the minor, — the court, to prevent a fraud on the other party, unnecessary to his protection, will not permit him to recover what he has parted with without setting off against it what he has received.

Such is this case.



CHAPTER VIII.

LIABILITY FOR NECESSARIES.

HYMAN v. CAIN.

1855. 3 *Jones' Law (North Carolina)*, 111.

THIS was an action of assumpsit, tried before his Honor, Judge DICK, at the Fall Term, 1855, of Edgecombe Superior Court.

The declaration was for goods, etc., furnished to defendant. Plea "infancy" and a replication "that the articles furnished were necessities."

The material facts were agreed on by the counsel, and submitted as a special case; they are as follows: "The defendant who was an orphan about nine years old, without father or mother, and without a guardian, boarded with the plaintiff from March, 1852, until about the time a guardian was appointed, which was in August, 1854, and the only question made below, was whether the infant could be made liable for this boarding, etc. It was agreed that if his Honor should be of opinion with the plaintiff, judgment should be rendered for \$144.16, which is admitted to be a reasonable charge; but if the court should be of a contrary opinion, a non-suit should be entered.

Upon consideration of the case, his Honor was of opinion adverse to the plaintiff who submitted to a non-suit and appealed.

Rodman, for plaintiff.

No counsel for defendant.

BATTLE, J. The case agreed presents the single question, whether the law will imply a promise on the part of an infant to pay a reasonable price for necessities furnished to him; and of that we think there can be no doubt.

In the case of *Richardson v. Strong*, 13 Ire. Rep. 106, it was held that a promise by a lunatic to pay for services rendered to, and necessities furnished for, him, during a temporary fit of insanity, would be implied, and that he might be compelled, after his recovery, to pay what they were fairly worth. In the course of the opinion the court say, "There is no absurdity in the case of lunatics, more than in that of infants, in implying a request to one rendering necessary services or supplying necessary articles, and implying, also, a promise to pay for them." In this extract, it is seen that the responsibility of infants is

assumed as settled, and is made an argument in favor of the responsibility of lunatics.

The cases of *Hussey v. Rountree*, Bus. Rep. 110, and *State v. Cook*, 12 Ire. Rep. 67, which are referred to on behalf of the defendant, were decided upon the ground that the infants had guardians whose duty it was to furnish them with necessaries, and who were prohibited, ordinarily, from exceeding their income. Under such circumstances no other person had a right to interpose between the guardians and their wards, by supplying the latter even with necessaries.

The principle in these cases has not destroyed the salutary rule of the common law, that infants, having no legal protectors, had better be held liable to pay for necessary food, clothing, etc., than, for the want of credit, to be left to starve.

The judgment must be reversed, and, according to the case agreed, judgment must be entered in favor of the plaintiff for the sum of \$144, 16-100, which is admitted to be a reasonable charge for the defendant's board.

PER CURIAM.

Judgment reversed.

FISHER, C. J., IN SMITH v. CROHN.

1896. *Texas, Court of Civil Appeals*, 37 *Southwestern Reporter*, 469, pp. 269, 270.¹

FISHER, C. J. It was an issue in the case whether one of the appellants, W. G. Smith, was a minor, and, if so, whether he was liable for the account sued upon, and for the foreclosure of the mortgage. The question of minority was a question of fact for the jury. If it was true that he was a minor at the time the contracts were made, he would become liable, and bound, not upon the contracts, but upon an implied promise to pay for those articles embraced in the account which a jury trying the case might determine to be necessaries furnished the infant, and he would be bound only for the reasonable value of those articles, and for a foreclosure of the mortgage to this extent. The court, in charging the jury, submitted the liability of the appellant W. G. Smith upon the theory that, if he was a minor, he would only be bound for the necessaries furnished him, but nowhere instructed the jury that his liability would extend only to the reasonable value of the goods sold. This is a part of the law that makes an infant liable, and should have been given in charge to the jury. For the error in this respect the judgment will be reversed, and the cause remanded.

¹ Only part of the opinion is given. — ED.

EARLE v. REED.

1845. 10 *Metcalf* (Massachusetts), 387.¹

SHAW, C. J. This is a case, undoubtedly, of some difficulty. It is that of a note attested, negotiable in its terms, given by a minor but retained by the promisee, unindorsed, and sued after the promisor came of age.

The court are of opinion, in the first place, that such a note, so far as it constitutes a contract between the promisor and promisee, is not void, but voidable only; because, in any action brought on it, the consideration is open to inquiry, and, if given for goods, it will be competent to inquire both whether the goods were necessities, and the just value of them, and judgment may be rendered, *pro tanto*, for that part of the note only for which a minor would be legally liable. An action will lie on an express contract of a minor to pay for necessities, as well as on an implied one, where the contract is of such a nature, as to leave the question of consideration open to inquiry. *Stone v. Dennison*, 13 Pick. 1.

That in an action by promisee against promisor the consideration may be fully inquired into, and judgment given for that part of the note only for which there was a good consideration, was decided in the cases of *Parish v. Stone*, 14 Pick. 198, and *Harrington v. Stratton*, 22 Pick. 516.

The distinction between the contract which subsists between promisor and promisee, on a note payable to order, but not indorsed, and that which would subsist between the promisor and an indorsee after an indorsement to a third person, is recognized and illustrated in the case of *Thurston v. Blanchard*, 22 Pick. 18. The difference is most important, as it applies to the present case. In the former, suppose it a note given on the sale of goods, it is a mere simple express contract to pay the price of the goods, and is itself rescinded by anything that rescinds the sale. In the latter, it is an absolute contract to pay the sum stipulated, in which, in general, there can be no inquiry respecting the consideration.

Under these views, we consider this note, in the hands of the promisee, as the simple contract of the defendant for the payment of money; and there being no consideration expressed, the infancy of the promisor, being shown, is *primâ facie* a bar to the action. But as the consideration is open to inquiry, we think it is competent for the plaintiff to show that it was given for the price of necessities, in which he will recover only so much of the note as shall appear to have been given for necessities, at their fair value, without regard to the price stipulated to be paid by the minor.

¹ Statement and arguments omitted. — ED.

This being a note valid as between the parties, we think it is saved from the operation of the statute of limitations, by the proviso that it shall not apply to any action brought upon a promissory note which is signed in the presence of an attesting witness, if brought by the original payee. Rev. Sts. c. 120, § 4. The attestation by a witness does not vary or affect the obligation of the contract, and requires no increased capacity or discretion to make it, but only remotely affects the remedy upon it; and there seems to be no reason why it should not apply as well to the note of a minor, when he has power to make one, as to that of a person of full age.

[Remainder of opinion omitted.]

GREGORY v. LEE.

1894. 64 *Connecticut*, 407.¹

TORRANCE, J. The complaint in this case alleges that on the first of June, 1892, the defendant, being a student in Yale College, entered into a contract with the plaintiff by which he leased a room for the ensuing college year of forty weeks, at an agreed rate of ten dollars per week, payable weekly, and immediately entered into possession of said room, and has neglected and refused to pay the rent of said room for the ten weeks ending February 7th, 1893.

The answer in substance is as follows:—

On or about September 15th, 1892, the defendant agreed to lease a room in the house of the plaintiff for the ensuing college year of forty weeks, at the agreed rate of ten dollars per week, payable weekly; that he then entered into possession of said room and occupied it till December 20th, 1892; that on said day he gave up possession of said room, and ceased to occupy the same, and then paid to the plaintiff all he owed her for such occupation and possession up to that time; that immediately thereafter he engaged at a reasonable price another suitable room elsewhere, and continued to possess and occupy the same till the end of said college year; that during all of said period he was a minor and a student in said college; and that on December 20th, 1892, he refused to fulfil said agreement with the plaintiff to occupy or pay for said room for the remainder of said forty weeks, and has always refused to pay for the time during which he did not possess or occupy said room.

The reply to the answer was as follows:—

“Par. 1. Plaintiff admits all the allegations of said defense.

“Par. 2. Defendant at the time of making said contract was between nineteen and twenty years of age.

¹ Statement and arguments omitted.—Ed.

"Par. 3. Defendant and his parents are residents of the Island of Trinidad. His father makes him an annual allowance out of which he is expected to defray all his college expenses, including room and board, transacting the business incidental thereto in his own name and not on account of his father.

"Par. 4. It is the general custom among students and lodging-house keepers to rent rooms for the college year of forty weeks, and students also usually contract for and pay tuition by the year. Defendant at the time of renting said rooms had contracted for his tuition during the college year.

"Par. 5. The rent charged for the room was fair and reasonable, and was suitable to his necessities as a student and to his condition in life. It was also necessary for him to have a room as a place of lodging and study during his college year.

"Par. 6. Defendant could not have obtained a room equally suitable for his purpose nor on such advantageous terms if he had not contracted for the year, except by going to a hotel and paying the usual charges made by hotels for such period as he wished to stay. The cost of this would have been considerably greater.

"Par. 7. Owing to the custom above noted, plaintiff cannot rent her room for the balance of the year, and will be subjected to great loss, unless defendant is compelled to pay rent for the balance of said period."

There was also filed in the case a second defense and a reply to the same, which in view of the conclusion reached upon the first defense and the reply thereto, need not be considered.

To the reply above set out, the defendant demurred specially, the court below sustained the demurrer, and judgment was rendered for the defendant. The sole reason of appeal is the claimed error of the court in sustaining the demurrer.

Upon this appeal the facts stated in the answer, and also in the reply so far as the same are well pleaded, must be taken to be true.

It thus appears that the defendant, a minor, agreed to hire the plaintiff's room for forty weeks at ten dollars per week, and that he entered into possession and occupied it a part of said period; that he gave up and quit possession of the room and refused to fulfil said agreement on the 20th of December, 1892, paying in full for all the time he had occupied it; that he has never occupied it since, but has been paying for and occupying a suitable room elsewhere.

Under the facts stated, it must be conceded that this room at the time the defendant hired it, and during the time he occupied it, came within the class called "necessaries," and also that to him during said period it was an actual necessary; for lodging comes clearly within the class of necessities, and the room in question was a suitable and proper one, and during the period he occupied it, was his only lodging room. "Things necessary are those without which an individual cannot reasonably exist. In the first place, food, raiment, lodging, and the like.

About these there is no doubt." *Chapple v. Cooper*, 13 M. & W. 252; 1 Swift's Digest, 52.

So long then as the defendant actually occupied the room as his sole lodging room it was clearly a necessary to him, for the use of which the law would compel him to pay; but as he paid the agreed price for the time he actually occupied it, no question arises upon that part of the transaction between these parties.

The question now is whether he is bound to pay for the room after December 20th, 1892. The obligation of an infant to pay for necessities actually furnished to him does not seem to arise out of a contract in the legal sense of that term, but out of a transaction of a *quasi* contractual nature; for it may be imposed on an infant too young to understand the nature of a contract at all. *Hyman v. Kain*, 3 Jones' L. (N. C.) 111. And where an infant agrees to pay a stipulated price for such necessities, the party furnishing them recovers not necessarily that price but only the fair and reasonable value of the necessities. *Earl v. Reed*, 10 Met. 387; *Barnes v. Barnes*, 50 Conn. 572; *Trainer v. Trumbull*, 141 Mass. 527; Keener's Quasi Contracts, p. 20. This being so, no binding obligation to pay for necessities can arise until they have been supplied to the infant; and he cannot make a binding executory agreement to purchase necessities. For the purposes of this case perhaps we may regard the transaction which took place between these parties in September, 1892, either as an agreement on the part of the plaintiff to supply the defendant with necessary lodging for the college year, and on the part of the defendant as an executory agreement to pay an agreed price for the same from week to week; or we may regard it, as what on the whole it appears the parties intended it to be, a parol lease under which possession was taken, and an executory agreement on the part of the defendant to pay rent. If we regard it in the former light, then the defense of infancy is a good defense; for in that case the suit is upon an executory contract to pay for necessities which the defendant refused to take and never has had and which therefore he may avoid. If we regard the transaction as a lease under which possession was taken, executed on the part of the plaintiff, with a promise or agreement on the part of the defendant to pay rent weekly, we think infancy is equally a defense.

As a general rule, with but few exceptions, an infant may avoid his contracts of every kind, whether beneficial to him or not, and whether executed or executory. *Riley v. Mallory*, 33 Conn. 201. The alleged agreement in this case does not come within any of the recognized exceptions to this general rule. "An infant lessee may also avoid a lease, although it is always available for the purpose of vesting the estate in him so long as he thinks proper to hold it. . . . As to his liability for rent, or the performance of the stipulations contained in the lease, he is in the same situation, with respect thereto, as in case of any other contract; for he may disaffirm it when he comes of age, or at any time previous thereto, and thus avoid his obligation." Tay-

lor's Landlord and Tenant, § 96. In this case the defendant gave up the room and repudiated the agreement, so far as it was in his power to do so, in the most positive and unequivocal manner.

The plea of infancy then, under the circumstances, must prevail, unless the matters set up in the reply make the facts set up in the answer unavailable in this case. Upon this point, without dwelling in detail upon the matters set up in the different paragraphs of the reply, we deem it sufficient to say that neither singly nor combined do the matters so set up constitute a sufficient reply to the answer.

There is no error.

In this opinion the other judges concurred.

WHITTINGHAM v. HILL.

16 James I. In B. R. Croke, James, 494.

ASSUMPSIT, in the court in Shrewsbury, to pay such a sum for wares sold. The defendant pleaded, that he was *within age* at the time of the wares sold.

The plaintiff, *protestando* that, &c., he was not within age, *pro placito dicit*, that he bought them *pro necessario victu et apparatu, et ad manutentionem familie sue*.

The defendant rejoins, that he kept a mercer's shop at Shrewsbury, and bought those wares to sell again; and traverseth that he bought them *pro necessario victu et apparatu*.

The plaintiff thereupon demurred; and before Baron BROMLEY, being steward there, it was adjudged for the plaintiff.

A writ of error thereof was brought; and the error assigned in point of law, That this buying by the defendant, being a shopkeeper, although he bought for the maintenance of his trade, shall not bind him.

The court here were all of that opinion; for an infant shall not be bound by his bargain for anything but for his necessity, *viz.* diet and apparel, or necessary learning: but his buying to maintain his trade, although he gain thereby his living, shall not bind him; nor his covenant to bind himself apprentice, unless it be by special custom. Wherefore the judgment was reversed. *Vide* 18 Edw. IV., pl. 2; 10 Hen. VI., pl. 24; Perkins, fol. 6, and 5 Eliz., c. 4.

RYAN v. SMITH.

1896. 165 *Massachusetts*, 303.

CONTRACT, to recover money paid by the plaintiff, a minor. Trial in the Superior Court, without a jury, before SHELDON, J., who found for the plaintiff; and the defendant alleged exceptions, the nature of which appears in the opinion.

B. W. Warren, for the defendant.

A. W. Dana, for the plaintiff.

KNOWLTON, J. The only question in this case is whether the judge should have ruled, at the request of the defendant, that the articles purchased by the plaintiff were necessities. They were a barber's shop and chair and divers other articles of furniture designed to be used in furnishing a barber's shop. The plaintiff was a minor, and he had no means of support except what he earned. The law does not contemplate that a minor shall open a shop and become a trader, or the proprietor of a business which involves the making of a variety of contracts. This has long been settled by the authorities. *Tupper v. Cadwell*, 12 Met. 559. *Mason v. Wright*, 13 Met. 306. *Merriam v. Cunningham*, 11 Cush. 40. *Wallis v. Bardwell*, 126 Mass. 366. *McCarthy v. Henderson*, 138 Mass. 310. *Pyne v. Wood*, 145 Mass. 558. It is clear that the articles in question were not necessities. If they had been hand tools to a reasonable amount, such as are ordinarily provided by a journeyman, and necessary for use in his trade or business, the case would be different. *Exceptions overruled.*

TUPPER v. CADWELL.

1847. 12 *Metcalf (Massachusetts)*, 559.¹

ASSUMPSIT for labor done and materials furnished in rebuilding and repairing a house. At the time of the repairs, the defendant was a minor. The house belonged to him, subject to his mother's right to the use of one undivided third part for life. Before the plaintiff was employed, other carpenters employed by the defendant's mother had taken off the roof of the main house and had cut away a portion of the rear of the main building. There was some circumstantial evidence tending to show that the defendant, alone, or jointly with his mother, employed the plaintiff.

The defendant's counsel requested the court to instruct the jury, that if they believed the defendant to be a minor when said work was done and said materials found, he was not liable to pay for them; but

¹ Statement abridged. Arguments omitted. — ED.

the court declined to give this instruction, and charged the jury, that if the mother alone made the contract, the son was not liable; that if the son employed the plaintiff alone, or jointly with the mother, he was not liable, if he was then a minor, unless the work and materials furnished by the plaintiff were actually necessary to prevent immediate serious injury or destruction of the property; that if the repairs and work done by the plaintiff could have been postponed until the next year, or until the defendant's majority, they were not necessities, and the defendant was not liable; that in passing upon this point, the jury might look to the actual condition in which the property was, at the time when the plaintiff was first employed, and began to work; that if, at this point of time, the roof had been stripped off, the chimneys taken down, and the frame exposed, by other workmen not connected with the plaintiff, and over whom the plaintiff had no control, so as to expose the property to immediate and irremediable injury, then so much of the plaintiff's work and materials as was requisite to prevent this, were necessities, and if the defendant contracted for them, he was liable.

The jury found a verdict for the plaintiff for \$300. Upon being inquired of by the court, they stated that they had found the defendant to be a minor when the work was done, and that the whole of the plaintiff's work and materials were necessary. The defendant excepted to the ruling of the court.

R. A. Chapman, for defendant.

H. Morris, for plaintiff.

DEWEY, J. An infant may make a valid contract for necessities; and the matter of doubt in the present case is, what expenditures are embraced in the term "necessaries." In Co. Lit. 172 *a*, it is said, "An infant may bind himself to pay for his necessary meat, drink, apparel, necessary physic, and such other necessities, and likewise for his good teaching or instruction, whereby he may profit himself afterwards." The term "necessaries," it is well settled, also embraces necessary articles for the support of his wife and children, if he has such to maintain. The wants to be supplied are, however, personal; either those for the body, as food, clothing, lodging, and the like; or those necessary for the proper cultivation of the mind, as instruction suitable and requisite to the useful development of the intellectual powers, and qualifying the individual to engage in business when he shall arrive at the age of manhood.

It has sometimes been contended that it was enough to charge the party, though a minor, that the contract was one plainly beneficial to him in a pecuniary point of view. That proposition is by no means true, if, by it, it be intended to sanction an inquiry, in each particular case, whether the expenditure, or articles contracted for, were beneficial to the pecuniary interests of the minor. The expenditures are to be limited to cases where, from their very nature, expenditures for such purposes would be beneficial; or, in other words, they must belong to a class of expenditures which are in law termed beneficial to the infant.

What subjects of expenditure are included in this class is a matter of law, to be decided by the court. The further inquiry may often arise, whether expenditures, though embraced in this class, were necessary and proper, in the particular case; and this may present a question of fact. It is therefore a preliminary question to be settled, whether the alleged liability arises from expenditures for what the law deems "necessaries," and unless that be shown, it is not competent to introduce evidence to show that, in a pecuniary point of view, the expenditure was beneficial to the minor, as that is irrelevant.

No authority has been found which, in our opinion, sustains the position that a minor is liable for expenditures upon his real estate, of the character and under the circumstances here stated. No necessity can exist for such expenditures, solely upon the credit of the minor. The fact that he has real estate which may require supervision, and may need repairs, furnishes the proper occasion for the appointment of a guardian, through whose agency such repairs can be made, and, as the law assumes, more judiciously made, than through the agency of the minor. An infant is not liable for goods bought to furnish his shop and to enable him usefully to continue trade, although he keeps a public shop. *Whittingham v. Hill*, Cro. Jac. 494. *Whyneall v. Champion*, 2 Stra. 1083. 2 Stark. Ev. 726. See also *Dilk v. Keighley*, 2 Esp. R. 480. In such cases, the law deems the infant incompetent to carry on business, and for that reason holds him not liable for articles furnished him for trade, irrespective of the question whether, in the particular state of his business, the addition to his stock was actually beneficial. This question is not open, in such cases. We think a similar rule prevails as to expenditures for improvements upon the real estate of a minor. The law deems him incompetent to make such contracts; and they not being of the class embraced in the term "necessaries," no legal liability arises for such expenditures, as against the infant personally.

The exceptions being sustained upon this ground, we have not thought it necessary to consider the effect of the former judgment, recovered against Mary Cadwell, for the same repairs.

New trial ordered.

RYDER v. WOMBWELL.

1868. *Law Reports*, 4 *Exchequer*, 32.¹

IN the Exchequer Chamber, on appeal from the decision of the Court of Exchequer, reported L. R. 3 Exch. 90.

Bulwer, Q. C. (*Mayd* with him), for defendant.

Popham Pike (*Coleridge*, Q. C., with him), for plaintiff.

Cur. adv. vult.

¹ Statement and arguments omitted. — ED.

The judgment of the court (WILLES, BYLES, BLACKBURN, MONTAGUE SMITH, and LUSH, JJ.) was delivered by

WILLES, J. In this case the plaintiff replied to a plea of infancy, that the goods were necessities suitable to the degree, estate, and condition of the defendant, and on this issue was taken. On the trial before the Lord Chief Baron it was proved that the degree, estate, and condition of the defendant was that he was the younger son of a deceased baronet of good fortune and family; that during his minority he had an income of about £500 per annum, and on attaining his majority he became entitled to £20,000; that he moved in what is called the highest society, and rode races for a friend, the Marquis of Hastings, at whose house he was a frequent visitor. Amongst the articles supplied by the plaintiff upon credit, and which, according to his case and the verdict of the jury, were necessities for an infant of this degree, were a silver-gilt goblet, which he ordered for the purpose of making a present to the Marquis of Hastings, price £15 15s., and a pair of solitaires or ornamental studs, worn as the fastenings of the wristbands of a shirt, which it is stated in the case were made of crystals set in gold and ornamented with diamonds, representing a horseshoe in which the nails were rubies. The price of these studs or solitaires was £25. No evidence was given of anything peculiar in the defendant's station rendering it exceptionally necessary for him to have such articles.

At the close of the plaintiff's case the defendant's counsel offered evidence that the defendant was already supplied with similar articles of jewelry to a large amount, so as to render any further supply unnecessary, but it being admitted that the plaintiff was not aware of this, the Lord Chief Baron rejected this evidence.

Leave was reserved to move to enter a nonsuit or reduce the damages, and the question whether these two articles were, under the circumstances, necessities, was left to the jury, who found for the plaintiff as to both of the articles above mentioned. They found for the defendant as to some other articles which it is consequently not necessary to notice. A rule *nisi* was obtained in the Court of Exchequer to enter a nonsuit or reduce the verdict pursuant to the leave reserved, or for a new trial on the ground of the improper rejection of evidence.

The rule was by the majority of the Court of Exchequer made absolute, to reduce the damages to £25, the value of the studs, thus deciding that there was no evidence on which the jury could find that it was necessary for the infant to buy on credit a goblet for the purpose of making a present, but that there was evidence on which they might find that it was necessary for him to buy such studs as are above described, and the rule for a new trial on the ground of the rejection of evidence was discharged. BRAMWELL, B., dissented from this judgment, as in his opinion there was no evidence to go to the jury; and the evidence rejected was admissible.

On appeal, therefore, there are two questions raised before us: First, whether there was evidence on which the jury might properly find that

both or either of those articles were necessities, on the determination of which depends whether the verdict should be restored to a verdict for the whole amount of £40 15s., or stand reduced to £25, or be altogether set aside and a nonsuit entered. Secondly, whether the evidence offered was admissible; the determination of which only affects the question whether there should be a new trial or not.

The general rule of law is clearly established, and is that an infant is generally incapable of binding himself by a contract. To this rule there is an exception introduced, not for the benefit of the tradesman who may trust the infant, but for that of the infant himself. This exception is that he may make a contract for necessities. And as is accurately stated by Parke, B., in *Peters v. Fleming*, 6 M. & W. at p. 46, "From the earliest time down to the present the word necessities is not confined in its strict sense to such articles as were necessary to the support of life, but extended to articles fit to maintain the particular person in the state, station, and degree in life in which he is; and therefore we must not take the word necessities in its unqualified sense, but with the qualification above pointed out. Then the question in this case is whether there was any evidence to go to the jury that any of these articles were of that description." In the present case, the first question is whether there was any evidence to go to the jury that either of the above articles was of that description. Such a question is one of mixed law and fact; in so far as it is a question of fact, it must be determined by a jury, subject no doubt to the control of the court, who may set aside the verdict and submit the question to the decision of another jury; but there is in every case, not merely in those arising on a plea of infancy, a preliminary question, which is one of law, viz., whether there is any evidence on which the jury could properly find the question for the party on whom the onus of proof lies. If there is not, the judge ought to withdraw the question from the jury and direct a nonsuit if the onus is on the plaintiff, or direct a verdict for the plaintiff if the onus is on the defendant. It was formerly considered necessary in all cases to leave the question to the jury if there was any evidence, even a scintilla, in support of the case; but it is now settled that the question for the judge (subject, of course, to review) is, as is stated by Maule, J., in *Jewell v. Parr*, 13 C. B. at p. 916, not whether there is literally no evidence, but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established. In *Toomey v. London and Brighton Railway Company*, 3 C. B. (N. S.) at p. 150, Williams, J., enunciates the same idea thus: "It is not enough to say that there was some evidence. . . . A scintilla of evidence . . . clearly would not justify the judge in leaving the case to the jury. There must be evidence on which they might reasonably and properly conclude that there was negligence," — the fact in that case to be established. And in *Wheelton v. Hardisty*, 8 E. & B. at p. 262, in the considered judgment of the majority of the court, it is said, "The question is, whether the proof was such that

the jury would reasonably come to the conclusion" that the issue was proved. "This," they say, "is now settled to be the real question in such cases by the decisions in the Exchequer Chamber; which have, in our opinion, so properly put an end to what had been treated as the rule, that a case must go to the jury if there were what had been termed a scintilla of evidence." In this Lord Campbell agreed, though differing as to the result. See 8 E. & B. at p. 266. And taking that as the proper test, we think that there was not in this case evidence on which the jury could reasonably find that it was necessary for maintaining the defendant in the station of life in which he moved, either that he should give goblets to his friends, or wear shirt buttons composed of diamonds and rubies costing £12 10s. apiece.

We must first observe that the question in such cases is not whether the expenditure is one which an infant, in the defendant's position, could not properly incur. There is no doubt that an infant may buy jewelry or plate, if he has the money to pay and pays for it. But the question is whether it is so necessary for the purpose of maintaining himself in his station that he should have these articles, as to bring them within the exception under which an infant may pledge his credit for them as necessities. The Lord Chief Baron, in his judgment, questions whether under any circumstances it is competent to the judge to determine, as a matter of law, whether particular articles are or are not to be deemed necessities suitable to the estate and condition of an infant, and whether, if in any case the judge may so determine, his jurisdiction is not limited to those cases in which it is clear and obvious that the articles in question not merely are not, but cannot, be necessities to any one of any rank, or fortune, or condition whatever? This is an important principle which, if correct, fully supports the judgment below, but we cannot assent to it. We quite agree that the judges are not to determine facts, and therefore where evidence is given as to any facts, the jury must determine whether they believe it or not. But the judges do know, as much as juries, what is the usual and normal state of things, and consequently whether any particular article is of such a description as that it may be a necessary under such usual state of things. If a state of things exist (as it well may) so new or so exceptional that the judges do not know of it, that may be proved as a fact, and then it will be for the jury under a proper direction to decide the case. But it seems to us that if we were to say that in every case the jury are to be at liberty to find anything to be a necessary, on the ground that there may be some usage of society, not proved in evidence and not known to the court, but which it is suggested that the jury may know, we should in effect say that the question for the jury was whether it was shabby in the defendant to plead infancy.

We think the judges must determine whether the case is such as to cast on the plaintiff the onus of proving that the articles are within the exception, and then whether there is any sufficient evidence to satisfy that onus. In the judgment of Bramwell, B., in the court below, many

instances are put well illustrating the necessity of such a rule. It is enough for the decision of this case if we hold that such articles as are here described are not *primâ facie* necessary for maintaining a young man in any station of life, and that the burthen lay on the plaintiff to give evidence of something peculiar making them necessities in this special case, and that he has given no evidence at all to that effect.

The cases will, we think, be found to be quite consistent with this view. In *Peters v. Fleming*, 6 M. & W. 42, the court took judicial notice that it was *primâ facie* not unreasonable that an undergraduate at college should have a watch, and consequently a watch chain, and that therefore it was a question for a jury whether the watch chain supplied on credit in that particular case was such a watch chain as was necessary to support himself properly in his degree. In laying down the law as to the particular case, Parke, B., says (6 M. & W. at p. 47): "All such articles as are purely ornamental are to be rejected, as they cannot be requisite for any one." Possibly there may be exceptional cases in which things purely ornamental may be necessary. In such a state of things as we believe existed at the close of the last century, it might have been a question for a jury whether it was not necessary, for the purpose of maintaining his station, for a young gentleman moving in society to purchase wigs and hair powder; but as a general rule, and in the absence of some evidence to shew that the usages of society required the use of such things, we think the rule laid down in *Peters v. Fleming*, 6 M. & W. at p. 47, is correct. It was approved of in *Wharton v. Mackenzie*, 5 Q. B. 606, where Coleridge, J., says (5 Q. B. at p. 612), that in some cases it must be for the judge to decide the question. Where evidence is given, as he observes, of exceptional circumstances, the case must go to the jury with proper directions, but in the absence of any explanation the court will decide. So in *Brooker v. Scott*, 11 M. & W. 67, Parke, B., during the course of the argument, says (11 M. & W. at p. 68): "*Primâ facie*, these articles are not necessities under the circumstances, and the tradesman must shew them to be so;" and in giving judgment he says (11 M. & W. at p. 69): "If there had been any explanation of the circumstances under which they were supplied, it might possibly have varied the case, but no explanation whatever is given of them;" and on that ground a nonsuit was entered.

No doubt there are many cases in which the court have held that such evidence had been given, and that the case could not be withdrawn from the jury, several of which are cited by the Lord Chief Baron in his judgment, but none in which it is laid down that the court is bound to consider itself ignorant of every usage of mankind, and therefore bound, in the absence of all evidence on the subject, to take the opinion of a jury as to whether it is not so necessary for a gentleman to wear solitaires of this description, that, though an infant, he must obtain them on credit rather than go without.

There is, no doubt, a possibility in all cases where the judges have

to determine whether there is evidence on which the jury may reasonably find a fact, that the judges may differ in opinion, and it is possible that the majority may be wrong. Indeed, whenever a decision of the court below on such a point is reversed, the majority must have been so either in the court above or the court below. This is an infirmity which must affect all tribunals. But in the present case we do not think any such case has arisen, for we do not understand any of the judges to proceed on the ground that they think that, in fact, the solitaires of this expensive character were shirt buttons really got for utility, and that the degree of ornament was only accidental, or that the jury were not wrong if they so found, but on the ground that it was not a question for the court at all.

Taking this view of the law and facts, it follows that the judgment should be reversed, and a nonsuit entered. It becomes therefore unnecessary to decide whether the evidence tendered was properly rejected or not. That is a question of some nicety, and the authorities are by no means uniform. In *Bainbridge v. Pickering*, 2 Wm. Bl. 1325, the Court of Common Pleas seem to have acted on a principle which would make the evidence admissible. In *Brayshaw v. Eaton*, 7 Scott, 183, Bosanquet, J., treats it as clearly admissible, and on those authorities the Court of Queen's Bench (then consisting of Blackburn, J., and Mellor, J.) acted in *Foster v. Redgrave*, ante, p. 35, n. (8). There is much to be urged in support of the view taken by the majority in the court below, and we desire not to be understood as either overruling or affirming that decision. If ever the point again arises, the court before which it comes must determine it on the balance of authority and on principle, without being fettered by a decision of this court.

Judgment reversed and a nonsuit entered.

BURGHART v. HALL.

1838. 4 Meeson & Welsby, 727.¹

THIS was an action by the plaintiff, a tailor, to recover the amount of his bill for uniforms and other clothes supplied by him to the defendants' testator, Captain Nisbett, in his lifetime. The defendants pleaded the infancy of the testator, to which there was a replication that the goods were necessities. The action was brought under the direction of LORD CHANCELLOR LYNDHURST. At the trial before Lord ABINGER, C. B., at the Middlesex Sittings after Michaelmas Term, 1837, it appeared that Captain Nisbett was a minor at the time when the clothes were supplied, but it was proved also that he had an allowance of £500 a year, besides his pay as a captain in the Guards. The

¹ Portions of the arguments are omitted. — ED.

LORD CHIEF BARON, in summing up, expressed his opinion that if the infant had an income sufficient to provide him with necessaries suitable to his condition for ready money, he could not contract even for necessaries upon credit; and the jury, acting upon this direction, found a verdict for the defendants.

In Hilary Term, 1838, Erle obtained a rule *nisi* for a new trial, on the ground of misdirection; citing *Darby v. Boucher*, 1 Salk. 279, 286, and *Earl v. Peale*, 10 Mod. 67, and contending that the infant might enter into any reasonable contract for necessaries, although on credit. In Easter Term following,

Thesiger, Leahy, and Bayley shewed cause. . . . Here it was proved that the deceased was allowed £500 a year besides his pay as a captain in the army, and that that allowance was ample for his station in life. It probably will not be disputed, that, if his guardians had found him necessaries in kind, the action would not be maintainable: yet this is merely another mode in which they choose to supply him with necessaries, he being from home, and in the army. The ground of allowing an infant to obtain credit for necessaries, is that he shall not starve; but if he has sufficient money supplied to him, it is not essential that he should have credit for what might otherwise be deemed necessaries. It is no doubt the duty of the tradesman to make inquiries. . . . It is not competent to a tradesman to shut his eyes to the fact of the minor's having an allowance, and he cannot be allowed to dictate to the guardian the way in which he shall be supplied with necessaries. In *Bainbridge v. Pickering*, 2 W. Bla. 1325, Gould, J., says, "No man shall take upon himself to dictate to a parent what clothing the child shall wear, or at what time they shall be purchased, or of whom. All that must be left to the discretion of the father or mother." There is no reasonable distinction between necessaries provided in kind and a money allowance, on a question whether credit has been properly given. . . .

Erle, Platt, and Jardine, contra.

It is for the advantage of the infant that he should be capable of binding himself to pay for necessaries at a future day. Suppose, when a uniform proper for this gentleman's station was brought home to him, being asked for the amount, he replied: "No, I have got money in a box, but I will not pay you till next week:"—is the tailor to take it back? Suppose on the 1st of January he is paid his half yearly allowance, and before the 20th he is robbed of it or has lost it, is that to bar the tailor from recovering? Or take the case of a schoolmaster, where it is necessarily a continuing contract, as you cannot pay for each lesson: if the allowance is squandered, is he to be prevented from recovering? [PARKE, B.—The question is to be looked at as at the time of the contract being entered into.] If the question were as to the liability of the guardian or the executor to make up the loss, the case might be very different. It is quite clear the infant could make a

contract to pay ready money : and if it were not paid, the tradesman might either take the clothes away and bring an action for not taking them in, or leave them and bring an action for the amount. The rule as laid down by the learned Lord Chief Baron, would apply to articles of the most plain and homely description. But the point scarcely arises on these pleadings. The minor's having money supplied to him would not prevent the articles being necessities at the time they were ordered. And there might have been a rejoinder that the minor had been supplied with a sufficient allowance. *Cur. adv. vult.*

LORD ABINGER, C. B. In this case the rule must be absolute for a new trial. I am now convinced that I laid down the rule of law too rigorously at the trial. Mr. Erle's able argument has satisfied me that a minor is capable by law of entering into a contract, not merely for necessities for ready money, but into any reasonable contract for necessities, although he may have an income. I told the jury that he could not, under such circumstances, contract but for ready money. In that direction I certainly went farther than any case has carried the rule. On this ground of misdirection, therefore, there must at all events be a new trial. *Rule absolute.*

JOHNSTONE v. MARKS.

1887. *Law Reports*, 19 *Queen's Bench Division*, 509.

APPEAL from the County Court of Westminster.

The action was by the plaintiff, a tailor, against the defendant for the price of clothes supplied. The defence was infancy, to which the plaintiff replied that the goods supplied were necessities. It was proved at the trial that the goods in question were supplied by the plaintiff to the defendant, and that when they were supplied the defendant was under age. On the issue raised by the reply the solicitor for the defendant proposed to prove by the evidence of the defendant's father that the defendant was sufficiently supplied with clothes at the time of his purchases from the plaintiff. Upon objection by the plaintiff, the judge on the authority of *Ryder v. Wombwell*, Law Rep. 3 Ex. 90, held the evidence to be inadmissible.

The judge found that some of the clothes supplied were and that others were not necessities, and gave a verdict for the plaintiff for the price of those which he held to be necessities.

Heather, for defendant.

[Argument omitted.]

Rawlinson, for plaintiff. The evidence was inadmissible. It was not suggested that the plaintiff knew or had the means of knowing that, when the defendant entered into the contract, he was already suf-

ficiently provided with necessaries of the kind supplied. The fact if proved would have been as irrelevant to the issue as that of the defendant having an allowance sufficient to enable him to pay ready money for such necessaries. *Burghart v. Hall*, 4 M. & W. 727; *Ryder v. Wombwell*, Law Rep. 3 Ex. 90, is a decision of equal authority with *Foster v. Redgrave*, Law Rep. 4 Ex. 35 (note to *Ryder v. Wombwell* in Exch. Ch.), and *Barnes v. Toye*, 13 Q. B. D. 410.

LORD ESHER, M. R. I am of opinion that the evidence was improperly rejected. It lies upon the plaintiff to prove, not that the goods supplied belong to the class of necessaries as distinguished from that of luxuries, but that the goods supplied when supplied were necessaries to the infant. The circumstance that the infant was sufficiently supplied at the time of the additional supply is obviously material to this issue, as well as fatal to the contention of the plaintiff with respect to it. In *Ryder v. Wombwell*, Law Rep. 4 Ex. 32, the Court of Exchequer Chamber had cases before them which were inconsistent with the view taken in the court below, but, holding as they did that the goods supplied could not possibly be necessaries, there was no occasion for them to decide whether this evidence was relevant. A Divisional Court has since in *Barnes v. Toye*, 13 Q. B. D. 410, decided that the evidence is relevant and I entirely agree with the decision.

LINDLEY, L. J. I am of the same opinion. The decision of the Court of Exchequer in *Ryder v. Wombwell*, Law Rep. 3 Ex. 90, is contrary to the current of authority. If an infant can be made liable for articles which may be necessaries without proof that they are necessaries, there is an end to the protection which the law gives him. If he has enough of such articles, more cannot possibly be necessary to him. The law is in my opinion correctly stated in *Barnes v. Toye*, 13 Q. B. D. 410.

LOPES, L. J. As one of the judges who decided *Barnes v. Toye*, 13 Q. B. D. 410, I am, of course, of the same opinion.

The court added that should the question be raised before them sitting as a division of the Court of Appeal they would be prepared to give the same decision.

Appeal allowed.

DARBY v. BOUCHER.

5 *William & Mary*. 1 *Salkeld*, 279.

IN an *assumpsit* for money lent, and likewise for money laid out to the use of the defendant's wife *dum sola*. Upon *non assumpsit* pleaded, upon trial before TREBY, C. J., the defendant offered to give in evidence the infancy of the *feme* at the time of the promise, . . . [It was *held*, that infancy may be given in evidence upon a plea of the general issue.] And in this case there was another question made,

which was, one lends an infant money, who employs it in paying for necessaries, whether in that case the infant be liable. And it was held clearly by the chief-justice, that the infant is not liable; for it is upon the lending that the contract must arise, and after that time there could be no contract raised to bind the infant, because after that he might waste the money, and the infant's applying it afterwards for necessaries, will not by matter *ex post facto* intitle the plaintiff to an action.

MARLOW v. PITFIELD.

1719. 1 *Peere Williams*, 558.

ONE Pitfield, an infant, whose estate was considerable, but consisted chiefly of a reversion after his father's death, having married without his father's consent, was thereupon discarded by him, and forced to take a house for himself and his wife. Not long after this he attained his full age, and having during his infancy borrowed money (which money so borrowed amounted to £130), and therewith bought some necessaries, made his will, devising his real estate to trustees for the payment of his debts with interest.

The question was, whether the monies actually advanced to the testator Pitfield during his infancy were to be paid within this trust?

His Honour the Master of the Rolls took time to consider of it, and now gave his opinion that this money actually lent to the testator, though during his infancy, was within the trust, and ought to be paid.
[Part of opinion omitted.]

Secondly, Though the law be, that if one actually lend money to an infant, even to pay for necessaries, yet as the infant in such case may waste and misapply it, he is therefore not liable, according to the resolution in Salk. 279. It is however otherwise in equity; for if one lends money to an infant to pay a debt *for necessaries*, and in consequence thereof the infant does pay the debt, here although he may not be liable at law, he must nevertheless be so in equity; because in this case the lender of the money stands in the place of the person paid, *viz.*, the creditor for necessaries, and shall recover in equity, as the other should have done at law.

Thirdly, His Honour thought that as equity should take care of creditors, so it ought to shew it's concern for infants, and not give any encouragement whereby these might be drawn in during their infancy to take up such sums as might ruin them; and therefore had there been in the principal case the least circumstance of fraud, or had the money been advanced to supply the infant's extravagancies, he should have been of a different opinion; but here the principal sum being but £130, and the infant's estate considerable, and he being on his father's displeasure left destitute and obliged to borrow money for his neces-

sary support, it could not be imagined but had the testator been now living, and been asked the question, whether the debts which he had actually and without fraud contracted, should be paid within the trust? he would have said that they ought to be paid.

Wherefore considering all circumstances, and particularly since he did not barely desire that his debts should be paid, but with interest also (which is unusual); it was decreed, that this money actually lent as aforesaid, though during the testator's infancy, was within the trust.

KILGORE v. RICH.

1891. 83 *Maine*, 305.¹

ON exceptions.

This was an action of assumpsit on an account annexed. The defendant pleaded the general issue, with a brief statement averring his infancy. The case is stated in the opinion.

Joseph Williamson, for plaintiff.

William H. Fogler, for defendant.

PETERS, C. J. The jury found that, at the request of the defendant, then an infant, the plaintiff paid for him a board bill which he had previously contracted while attending school. It was ruled at the trial that the expense of an infant's board while attending school might be regarded as necessaries. The correctness of this ruling is perhaps unquestioned. At all events, Coke's enumeration of the kinds of necessaries has always been accepted as true doctrine, which are these: "Necessary meat, drink, apparel, necessary physick, and such other necessaries, and likewise his good teaching, or instruction, whereby he may profit himself afterwards."

It was also ruled at the trial, that an infant being liable to one person for such a bill, could make himself liable to another who should pay such bill for him at his request; the liability to such other person not to be measured by the amount actually paid, but limited, irrespective of the contract price, to such sum as would be a reasonable compensation for the board. This ruling does not appear to infringe against any legal principle, and an examination of the cases satisfies us that it is well supported by the authorities.

The infant's liability is in no way enlarged by owing the debt to one rather than to another. The rule lends no temptation to create a debt as it is already created. The right to transfer the liability from one to another might be a great convenience to a minor. One creditor might be unable or unwilling to wait for payment, while a friend and acquaintance, as a substituted creditor, might be accommodating in that re-

¹ Arguments omitted. — Ed.

spect. It would give a self-supporting minor more facilities for support. We have not, in our examination of authorities, noticed any case that opposes the principle. In *Clarke v. Leslie*, 5 Esp. 28, it was held that an infant who was threatened with arrest upon a process sued out against him on a debt for necessities, would be liable to a person who, at his request, advanced money to release him. In that case there was legal pressure, but in many instances moral pressure would be great. *Swift v. Bennett*, 10 Cush. 436, is a case where an infant bought an outfit for a whaling voyage, drawing for the amount of the bill on the plaintiffs, who accepted the bill and paid it when it became due. They were allowed to collect of the infant what the goods were reasonably worth to him, in an action for money paid on his account. So in *Conn v. Coburn*, 7 N. H. 368, a person who signed an infant's note, given for necessities, as a surety, was allowed after payment of the note to recover the amount paid, not upon the note, but as money paid for the benefit of the infant. *Randall v. Sweet*, 1 Denio, 460, is precisely in point with the present case.

The defendant relies on the rule generally prevailing in the cases that money is not a necessary, though lent to an infant who afterwards purchases necessities with it. "But," says Mr. Bishop, "one who pays money at his (infant's) request to a third person for necessities can recover it." Bish. Con. § 914. The difference is between lending or paying. Mr. Wharton (Whar. Con. § 72) finds the doctrine adopted in late American cases, that a person who lends money to an infant to purchase "specific" necessities stands in the position of the tradesman who furnishes the necessities. In the case at bar the plaintiff could have taken an assignment of the claim, and been entitled to recover it, and there really is no good reason to defeat his claim as it is here presented.

Exceptions overruled.

WALTON, VIRGIN, LIBBEY, HASKELL, and WHITEHOUSE, JJ., concurred.

CHAPTER IX.

LIABILITY FOR TORT.

HUCHTING v. ENGEL.

1863. 17 *Wisconsin*, 230.

ERROR to the Circuit Court for Dane County.

Huchting brought an action before a justice of the peace against Moirtz Engel, for breaking and entering the plaintiff's premises, and breaking down and destroying his shrubbery and flowers therein standing and growing. The answer, after a general denial, stated that if the defendant ever committed the alleged trespass, "He did so through the want of judgment and discretion, being an infant of about six years of age." On the trial before the justice, the plaintiff proved the alleged trespass and damages; and on the part of the defense it was shown that the defendant, at the time of the trespass, was but little more than six years old. A motion to dismiss the action, on the ground that the defendant was "of such tender years that a suit at law could not be maintained against him, nor execution issued on a judgment against him," was overruled. The justice rendered judgment against the defendant for \$3.00 damages, with costs. The Circuit Court, on appeal, reversed the judgment; and the plaintiff sued out his writ of error.

Abbott, Gregory & Pinney, for plaintiff in error.

Hopkins & Foote, for defendant in error, cited 4 Bacon's Ab. 353; 4 Blackstone's Comm. 72; *Hartfield v. Roper*, 21 Wend. 615, 619; 41 E. C. L. 422; 22 Vt. 213; 1 Bay, 64; 4 Allen, 289; 8 Gray, 123; 29 Barb. 236; 41 Law Lib. 314; 5 M. & S. 198.

By the Court, DIXON, C. J. "Infants are liable in actions arising *ex delicto*, whether founded on positive wrongs, as trespass or assault, or constructive torts or frauds." 2 Kent's Com. 241.

"Where the minor has committed a tort with force, he is liable at any age; for in case of civil injuries with force, the intention is not regarded; for in such a case a lunatic is as liable to compensate in damages as a man in his right mind." Reeve's Dom. Rel. 258.

"The privilege of infancy is purely protective, and infants are liable to actions for wrong done by them; as to an action for slander, an action of trover for property embezzled, or an action grounded on fraud committed." Macpherson on Infants, 481 (41 Law Lib. 305).

"Infants are liable for torts and injuries of a private nature ; as disseisins, trespass, slander, assault, &c." Bingham on Infancy, 110.

"All the cases agree that trespass lies against an infant." *Hartfield v. Roper*, 21 Wend. 620.

This is the language of a few of the many writers and courts who have spoken upon the subject. All agree, and all are supported by the authorities, with no single adjudged case to the contrary. *Jennings v. Randall*, 8 Term, 335 ; *Sikes v. Johnson*, 16 Mass. 389 ; *Homer v. Thwing*, 3 Pick. 492 ; *Campbell v. Stokes*, 2 Wend. 137 ; *Bullock v. Babcock*, 3 Wend. 391 ; *Neal v. Gillett*, 23 Conn. 437 ; *Humphrey v. Douglass*, 10 Vermont, 71. In the latter case the minor was held answerable for a trespass committed by him, although he acted by command of his father.

The authorities cited by the counsel for the defendant in error have no bearing upon the question. They relate to the criminal responsibility of infants ; to the question of negligence on their part, as whether it can be imputed to them so as to defeat actions brought by them to recover damages for personal injuries sustained in part in consequence of the negligence or unskilfulness of others ; and to the liability of parents and guardians for wrongs committed by infants under their charge by reason of the neglect or want of proper care of such parents or guardians. The case at bar is none of these. The defendant is not prosecuted criminally ; the action is not by him to recover damages for personal injury occasioned by the joint negligence of himself or his parents, and another ; nor is the liability of the parents involved. The suit is brought to recover damages for a trespass committed by him ; not vindictive or punitive damages, but compensation ; and for that he is clearly liable. If damages by way of punishment were demanded, undoubtedly his extreme youth and consequent want of discretion would be a good answer.

Judgment of the circuit reversed, and that of the justice of the peace affirmed.

SCOTT v. WATSON.

1859. 46 Maine, 362.

On facts agreed.

Trespass *quare clausum*, tried before the Municipal Court of Calais. The facts appear in the opinion of the Court.

J. Granger, for plaintiff.

[Citations omitted.]

G. W. Dyer, for defendant, argued —

That the *animus* with which torts are committed, is material. *Vosburgh v. Moak & als.*, 1 Cush. 453 ; *Brown v. Kendall*, 6 Cush. 292 ;

Story on Contracts, §§ 65, 66, and notes; *Jennings v. Randall*, 8 Term R. 335.

APPLETON, C. J. This is an action of trespass *quare clausum*, for breaking and entering the plaintiff's close and carrying away his hay; to which the only defence interposed is, that the defendant was a minor, acting under the authority and by the direction of his father.

"*Trespasse. Transgressio, derivatur a transgrediundo*," (says Lord Coke, as cited by the learned counsel for the defendant), "because it passeth over that which is right." Coke's Ins. 56, b. Now, the defendant, by entering without the plaintiff's license or permission upon his land, and cutting and carrying away his hay, very much "passeth over that which is right." Nor is his infancy any defence, for infants are liable for torts. *Campbell v. Stokes*, 2 Wend. 137; *Fitts v. Hall*, 9 N. H. 441; *School District in Milton v. Bragden*, 3 Foster, 507; *Lewis v. Littlefield*, 15 Maine, 233. The parent is not answerable for the torts of his minor child, committed in his absence and without his authority or approval, but the minor is answerable therefor. *Tift v. Tift*, 4 Denio, 177. The minor is not exempt from liability, though the trespass was committed by the express command of the father. *Humphrey v. Douglas*, 10 Vermont, 71.

Nor can the defendant derive any support from the scriptural injunction to children of obedience to their parents, invoked in defence. No such construction can be given to the command "children obey your parents in the Lord, for this is right," as to sanction or justify the trespass of the son upon the land of another, and the asportation of his crops, even though done by the express commands of his father. The defence is as unsound in its theology as it is baseless in its law.

Defendant defaulted for \$10.

TENNEY, C. J., CUTTING, DAVIS, and KENT, JJ., concurred.

The following dissenting opinion was read by

MAY, J. I am not quite satisfied with either the law or the theology of the opinion in this case. That sins of ignorance may be winked at, is both a dictate of reason and of scripture. It is true, as a general rule, that infants who have arrived at the age of discretion are liable for their tortious acts. But, for the protection of infants, ought not the rule to be limited to cases where the infant acts under such circumstances that *he must know or be presumed to know* that the acts which he commits are unauthorized and wrong, when it appears that in the commission of the acts he was under the control and direction of his father? Will not an opposite doctrine tend to encourage disobedience in the child, and thus be subversive of the best interests of the community? Will it not also tend to subject him to embarrassment and insolvency when he shall arrive at full age? If all the members of a family under age are to be held liable in trespass or trover for the food which they eat, when that food is in fact the property of another, but, being set before them, they partake of it, in ignorance of such fact, by the command or direction of the parent, and under the belief that it is

his, will not such a doctrine be in conflict with the principle that the common law is intended as a shield and protection against the improvidence of infancy? While the decided cases upon this subject seem to be limited to cases of contract, is there not the same reason for extending it, and applying it to cases like the one before us? In all the cases which I have examined in which infants have been held liable, the proof shows acts of positive wrong committed under circumstances where the infant must have known the nature and character of his acts. If the doctrines of the opinion are to prevail in a case like this, then the common law is but the revival of the old doctrine that the parents, by eating sour grapes, have set the children's teeth on edge. The rule that a servant who acts in ignorance of the rights of his principal is to be held liable for his acts, does not fall within the principles for which I contend.

HODSMAN v. GRISELL.

Noy's Reports and Cases taken in the time of Elizabeth, James I., and Charles I., 129.

UPON evidence to the Jury. By the Court that an action upon the case for words lyes against an Infant of 17 years of age. For *malitia supplet ætatem*.

[An infant of 15 was sued for slander; judgment was rendered against him; and he was taken in execution for the damages and costs. Being unable to pay, he applied to the Insolvent Court for a discharge; but that Court would not discharge him, because being a minor he could not make the assignment of property required by the Insolvent Act. Subsequently the Court of Common Pleas refused to discharge the infant; saying (*inter alia*) that "it would be opening a door to unlimited abuses, if an infant might be guilty of slander or trespass, without being liable to satisfy in his person what he could not in his purse." *Defries v. Davies*, 1835, 3 Dowling, 629.

In *People v. Mullin*, 1841, 25 Wendell, 698, it was held that an infant imprisoned on execution in an action of assault and battery was entitled to a discharge upon assigning his property; and that such assignment was valid notwithstanding his minority. — ED.]

NEAL v. GILLETT.

1855. 23 *Connecticut*, 437.¹

THIS was an action of trespass, tried before the jury, at the term of the Superior Court for Hartford County, holden in January, 1855.

On the trial upon the general issue, the plaintiff claimed to have proved, that on the first Monday of October, 1850, he was riding over a public highway, leading through a common, in the town of Suffield;

¹ Only so much of the case is given as relates to a single point. — ED.

that the defendants were there engaged in the game of ball, at the distance of one or two rods from said highway; that, by the acts of the defendants in playing said game, or by some other thing connected with said game, his horse became frightened, ran away and threw him out of the wagon, and that he was thereby seriously injured in his person and property. Upon these facts the plaintiff claimed to recover on the ground of the negligence of the defendants.

The defendants denied that they were guilty of negligence in the premises, but insisted and offered evidence to prove that the plaintiff was guilty of negligence, and that his negligence was the cause of the injury complained of. It was admitted and proved, that of the defendants, two were thirteen years of age, and one of them sixteen years of age, at the time of the injury complained of. The defendants thereupon requested the court to instruct the jury, that in determining the question of negligence, they were at liberty to take into consideration the age of the defendants, in connection with the other circumstances of the case, and that the law would not require the same acts of caution, and prudence, in a child, as in a man. The plaintiff claimed to recover actual damages and no other. The court did not so instruct the jury, but did instruct them that the age of the defendants was not to be taken into account by the jury, as they were only to allow in any event actual damages, this being all the plaintiff claimed.

The jury having returned a verdict for the plaintiff, the defendants moved for a new trial, claiming that the court erred in instructing the jury as aforesaid, and not instructing them as requested by the defendants.

R. D. Hubbard, in support of the motion.

1. The court erred, in ruling that the youth of the defendants was not to be taken into account, in determining the question of negligence. Negligence is the doing, or omitting to do an act with a lawful design, the consequences of which the actor or delinquent knows, or should know, would prove injurious to others. A child has not, and cannot have, the same knowledge, and therefore is not, in law, chargeable with the same knowledge, as an adult, of the relations and nature of things, of the duties which grow out of those relations, and of the consequences of acts done, or omitted to be done. To suppose therefore that, on a question of negligence, the jury are to make the same requirements of the one, as of the other, is to suppose the law of the land to be a transgression both of right reason, and the law of nature. The ruling in question is contrary to the law, as it has been repeatedly settled. *Lynch v. Nardin*, 41 E. C. L. R. 422. *Vasse v. Smith*, 6 Cranch, 226. *Birge v. Gardiner*, 19 Conn. R. 507.

[Remainder of argument omitted.]

Hooker and Philleo, contra.

I. The age of the defendants was not a proper matter for consideration, in determining the question of their negligence.

1. A person is liable for all the actual damage committed by him, — even if a deranged man, — or if the injury be accidental, — and on the same principle a child, not old enough to exercise intelligent volition, is liable. Volition has nothing to do with the question. 2. The cases, where extreme youth has been held to excuse a child from the exercise of ordinary care, are exclusively cases where the child has been a plaintiff; and no case can be found where this fact was held to excuse the negligence of a defendant. 3. If the extreme youth of a defendant would excuse his negligence, yet in the present case the defendants were of such age as to be bound to exercise the same care as adults. One of them was thirteen and the other sixteen years of age. 1 Sw. Dig. 531; 17 Vermont, 499; *Moore v. Crawford*, 10 Vermont, 71.

The true distinction is, that imbecility, non-age, and incapacity shall be a protection against any injury, but shall not be a protection from the just consequences of doing wrong, or inflicting injury.

[Remainder of argument omitted.]

SANFORD, J. [After stating the case.] Upon the first point, a majority of the court are of opinion that the charge was right; though we do not intend to decide whether the distinction taken by the plaintiffs' counsel in regard to the protection which infancy, or "non-age," affords, when claimed by a plaintiff, and when set up by a defendant, is well taken or not, and only remark, that we have been referred to no authority, which directly sanctions such distinction. We place our determination upon a different ground.

The youngest of these defendants was thirteen years of age, and in the absence of all proof to the contrary, must be presumed to have been emancipated from the dominion of mere "childish instinct;" and we think it would be mischievous to hold that persons of the age of thirteen years are, on account of their youth alone, absolved from the obligation to exercise their rights with ordinary care.

It may not be easy to fix upon the exact age when "childish instinct," and thoughtlessness, shall cease to be an excuse for conduct, which in an adult would be considered, and treated, as a want of ordinary care, but it is sufficient for the determination of this point, that these defendants had clearly passed that age.¹

[Remainder of opinion omitted. A new trial was granted for error in the charge upon another point.]

¹ As to the standard of care applied by courts to the conduct of infant plaintiffs when it is claimed that they are barred by contributory negligence; see 2 Ames & Smith's Cases on Torts, 187-191. — Ed.

McCABE v. O'CONNOR.

1896 4 Appellate Division (New York Supreme Court), 354.¹

APPEAL by Sarah J. O'Connor and three other defendants from a judgment in favor of plaintiff, entered upon the report of a referee.

The action was brought to recover damages to plaintiff's property, arising from the falling of a stone wall that was on defendants' property on the line between it and plaintiff's land. The appellants are four in number, three of whom are now infants, and the other one was an infant at the time of the injuries complained of.

It is found by the referee as matter of fact that on the 15th day of September, 1890, John O'Connor, their father, was appointed general guardian of their persons and property, and duly qualified and immediately entered upon his duties as such, and has so continued as to those not of age up to the present time; "that all of said infants lived with their father and general guardian on the premises mentioned in plaintiff's complaint, on which the wall in question was erected at the time said wall fell, and for several years previous thereto;

"*Third.* That during the year 1891, and for several years previous, defendant John H. Malone lived on said premises mentioned in said complaint, occupied by the infant defendants;

"*Fourth.* That during the year 1890 and for some time prior thereto, the plaintiff owned the premises described in the complaint.

"*Sixth.* That on the 25th day of March, 1891, said wall fell on plaintiff's property;

"*Seventh.* That said wall was defective and fell through the carelessness and negligence of the defendants;

"*Eighth.* That about five months before said wall fell the defendant John H. Malone was notified personally of its defect;

"*Ninth.* That by reason of defendants' negligence and the falling of the wall as aforesaid plaintiff was damaged to the amount of two hundred dollars."

As matter of law the referee found that the plaintiff was entitled to judgment against the defendants for damages in the sum of \$200 with interest from the commencement of the action and costs.

Henry J. McCormick and *James B. Egan*, for appellants.

Marcus L. Akin, for respondent.

MERWIN, J. [After stating the case.] The claim of the appellants is that, as they were infants, and had a general guardian at the time of the injury, they are not chargeable with negligence, and are not responsible for the injury.

In 2 Kent's Commentaries, 241, it is said: "Infants are liable in

¹ Statement abridged from opinion. — ED.

actions arising *ex delicto*, whether founded on positive wrongs or trespass or assault, or constructive torts, or frauds."

In Cooley on Torts (2d ed.), 122, it is said: "An infant as the owner or occupant of lands is under the same responsibility with other persons for any nuisance created or continued thereon to the prejudice or annoyance of his neighbors, and for such negligent use or management of the same, by himself or his servants, as would render any other owner or occupant liable to an adjoining proprietor. Here, also, the intent is immaterial. The wrong consists in the fact that enjoyment of one's own property or rights is diminished or destroyed by an improper use or unreasonable use or misuse of the property of another."

Morain v. Devlin (132 Mass. 87) was an action in tort for personal injuries occasioned to the plaintiff by the defective condition of a building owned by the defendant, who was a lunatic, and of whom a guardian had been appointed, who, at the time of the injury, had the care and management of all her property. It was held that the defendant was liable, and it was said: "This is not an action for a wrong done by the personal act or neglect of the lunatic, but for an injury suffered by reason of the defective condition of a place, not in the exclusive occupancy and control of a tenant, upon real estate of which the lunatic himself, and not his guardian, is the owner. (*Harding v. Lurned*, 4 Allen, 426; *Harding v. Weld*, 128 Mass. 587, 591.) The owner of real estate is liable for such a defect, although not caused by his own neglect, but by that of persons acting in his behalf or under contract with him (*Looney v. McLean*, 129 Mass. 33; *Gorham v. Gross*, 125 id. 232; *Bartlett v. Boston Gas Light Co.*, 117 id. 533), and there is no precedent and no reason for holding that a lunatic, having the benefits, is exempt from the responsibilities of ownership of real estate." The same doctrine is asserted in 16 American and English Encyclopædia of Law, 409. This doctrine would apply as well to infants as to lunatics.

The general rule is that a person must so use his property as not to injure that of his neighbor. (Moak's Underhill on Torts, 229.) In *Vincett v. Cook* (4 Hun, 318) it was held that failure on the part of the owner of a building to keep it in a safe condition and resulting damages throw upon the owner the burden of showing that the building was safe so far as diligent examination would show. The same view was taken in *Mullen v. St. John* (57 N. Y. 567). These cases related to the walls of a building, but there is no good reason apparent why the principle should not apply to a case like the present where the wall was entirely on defendant's land and was about twenty feet high, as appears from the complaint and answer. Nor is it clear that an owner in such a situation should be relieved of liability by saying that he is an infant and has a general guardian whose duty it was to keep the premises safe, but failed to do his duty.

Negligence is found here as a matter of fact. What the proofs were

we cannot say, as the evidence is not here. It may have been shown that negligence was based on their personal acts. It was found that they occupied the property. If occupants, clearly they might under proper proofs be charged with negligence. (2 Addison on Torts, 1126; Schouler's Dom. Rel. [2d ed.] 564.) We cannot reverse if in any view of the facts found the judgment was proper.

But it is said that no notice to the appellants was found. If there was no failure of duty until notice, then the finding of negligence presupposes the existence of such notice or knowledge as would be requisite to call upon the owner to act, and involves a finding to that effect. Notice is found to a co-tenant in occupation. If the infants were to be deemed occupiers, it would not follow as a matter of course that they would be entitled to notice.

The appellants have not, I think, shown that in any view of the facts found the judgment was not proper. It should, therefore, be affirmed.

PARKER, P. J., and LANDON, J., concurred; PUTNAM and HERRICK, JJ., dissented.

HERRICK, J. (dissenting). I am unable to concur in the opinion of Justice MERWIN in this case. Negligence is a violation of or omission to perform some duty. There can be no duty unless there is a power to fulfil it.

The guardian has absolute control of the lands and property of his ward. By statute it is the duty of the guardian not to "make or suffer any waste, sale or destruction of such things or of such inheritance, but [he] shall keep up and sustain the houses, gardens, and other appurtenances to the lands of his ward by and with the issues and profits thereof, or with such other moneys belonging to his ward as shall be in his hands." (2 R. S. 153, § 20 [Birdseye ed., p. 1292, § 44]; 2 Kent's Comm. 228.) The guardian can lease the land of his ward until he attains the age of twenty-one years, and may maintain an action of trespass or ejectment. (*Thacker v. Henderson*, 63 Barb., 271.)

The guardian having entire control of their property, the infants in this case were not in a position to either remove the wall in question or to repair and maintain it in a safe condition.

Again, negligence is actual or implied. There can be no actual or personal negligence charged on the part of the infant defendants, because they had no legal or actual control over the property in question. The negligence of their guardian cannot be implied or imputed to them as in the case where the principal is held responsible for the acts of an agent or the employer for the negligence of his employees; that proceeds upon the theory that the superior is responsible for the action of the inferior.

In the case of guardian and ward, the superior authority is that of the guardian, and the negligence of the guardian is the negligence of the superior, and the negligence of the superior cannot be implied or attributed to the inferior. The ward does not direct or control the

guardian, but the guardian the ward. In the absence of any finding of actual or personal negligence on the part of the infants, I do not think the judgment of negligence can be sustained against them.

The case of *Morain v. Devlin* (132 Mass. 87) does not seem to me entirely a parallel one. The interest of a committee of a lunatic in the property of the latter is different from that of a guardian in the estate of a ward. A committee of a lunatic is held to be a mere bailiff or agent to take care of and administer the property of the lunatic (*Matter of Strasburger*, 132 N. Y. 128; *People ex rel. Smith v. Commissioners of Taxes*, 100 id. 215), while, as we have seen, a guardian has the possession, custody, and control of his ward's land.

Judgment affirmed, with costs.

GILSON v. SPEAR.

1865. 38 *Vermont*, 311.

THIS is an action on the case for deceit, or fraudulent concealment of unsoundness in the sale of a horse. The plaintiff, in his declaration, alleged that on the 1st of April, 1863, he purchased of the defendant a horse for the price of one hundred and fifteen dollars, as and for a sound horse, and that the defendant, at the time of the sale, to induce the plaintiff to give this price, affirmed that the horse "was sound, wind and limb, and free from any defect whatever, but refused to warrant the same," whereas the horse, at that time, in fact was unsound, and then and for a long time before had an incurable disease called the heaves, and was lame; all which was well known to the defendant; and that the defendant, intending to cheat and defraud the plaintiff, concealed this disease and lameness from him, and he, the plaintiff, was wholly ignorant of the same, and that by reason of the same the horse is rendered worthless, and the plaintiff averred in his declaration that he has offered to return the horse to the defendant and receive back the purchase money given for the same, which offer was refused by the defendant. The defendant plead in the County Court to this declaration, (1) not guilty, and (2) that at the time of the sale of the horse to the plaintiff, he, the defendant, was an infant, within the age of twenty-one years, to wit, of the age of twenty years, concluding with a verification. The plaintiff joined issue on the first plea, and demurred to the second plea. At the December Term, 1865, Windsor County Court, BARRETT, J., presiding, the demurrer was *pro forma* overruled, and the plea of infancy was adjudged sufficient, and judgment was thereon rendered in favor of the defendant. To this decision and judgment the plaintiff excepted.

J. J. Wilson and A. P. Hunton, for the plaintiff.

Hutchinson & Rowell, for the defendant.

KELLOGG, J. The sole question in this case is whether an action on the case for deceit in the sale of a horse can be sustained against an infant; and, in considering this question, the facts alleged in the plaintiff's declaration are to be treated as admitted by the demurrer. It is an admitted general principle that an infant is liable in actions *ex delicto* for positive wrongs and constructive torts or frauds; and it is equally well settled that where the substantial ground of action is contract, a plaintiff cannot, by declaring a tort, render a person liable who would not have been liable on his contract. Whether the fraud in this case should render the defendant liable to an action *ex delicto* is the question which we are to consider.

[After commenting on numerous cases, including *West v. Moore*, 14 Vermont, 447, and *Fitts v. Hall*, 9 N. H. 441, the opinion continues.]

The allegation of concealment would not, therefore, distinguish this case from one in which the falsehood was distinctly affirmed in words; and the plaintiff's cause of action in this case derives no additional strength from his offer to return the property. The refusal of the defendant to return the price of the property was not a disaffirmance or avoidance of the contract by him, and unless he had the money in his possession so that he could restore it to the plaintiff when the horse was tendered back to him, no action of trover for it could be sustained against him. This was held in the case of *Fitts v. Hall*.

We think that the fair result of the American as well as of the English cases is that an infant is liable in an action *ex delicto* for an actual and wilful fraud only in cases in which the form of action does not suppose that a contract has existed; but that where the *gravamen* of the fraud consists in a transaction which really originated in contract the plea of infancy is a good defence. For simple deceit on a contract of sale or exchange, there is no cause of action unless some damage or injury results from it, and proof of damage could not be made without referring to and proving the contract. An action on the case for deceit on a sale is an affirmation by the plaintiff of the contract of sale, and the liability of the defendant in such an action could not be established without taking notice of and proving the contract. It was held by this court in *West v. Moore*, *ubi supra*, that the deceit or fraud to charge an infant must be wholly tortious, and that if the matter arises from contract, although infected with fraud, it cannot be turned into a tort to charge him by a change in the form of action; and this principle fully sustains the defence of infancy in this action. We think that there is no greater liability for deceit resulting from the fraudulent concealment by an infant of a material fact than there is for his false and fraudulent affirmation in respect to the same fact; and if the recognized rule of law by which our judgment is controlled is wrong it should be changed by statute, as it has been changed in some other states. (Code of Iowa, 1851, p. 224, § 1489; Compiled Laws of Kansas, 1862, p. 720, ch. 146, § 3.) It was well said by Gibson, C. J., in *Wilt v. Welsh*, *ubi supra*, that "in contemplation of law, an

infant of three years is not inferior in discretion to one of twenty," and it is to be remembered that no general principle of policy can be established without being the occasion of hardship or injustice in particular cases.

Judgment of the County Court for the defendant on demurrer to the defendant's plea affirmed.¹

ASHLOCK v. VIVELL.

1888. 29 *Illinois Appellate Reports*, 388.²

CONGER, J. The declaration in this case consists of two counts. The first an ordinary count in trover for the value of a horse. The second setting forth in detail the sale of a horse worth \$250 by appellant to appellee, who was a minor, the giving of a note therefor, the concealment by the appellee of his minority, and of an intention not to pay for the horse, the sale and conversion of the horse to the appellee's use, and his refusal to pay the note he had given. A demurrer was sustained to the second count. A plea of general issue [to the first count] was filed, and also a second plea [to the first count], averring that the plaintiff delivered the horse to the defendant under a contract of purchase, and in consideration of the delivery of the horse the defendant executed and delivered the promissory note described to the plaintiff; that defendant sold the horse, and at the time of making of the note and the sale of the horse the defendant was under twenty-one years of age, and that at the time the defendant arrived at the age of twenty-one years he did not have, and at no time since did he have, the possession of the horse, or any part of the proceeds of the sale thereof.

To this second plea a replication was filed, averring, in substance, that at the time of making the purchase the appellee did not intend to pay for said horse, and with such fraudulent intent upon his part not to pay for the horse, he, by such fraudulent means, procured the delivery to him of said horse, gave his note therefor with the fraudulent intent then formed not to pay said note, but defeat its payment by the plea of infancy, and that he took the horse to a foreign State, sold it and converted the proceeds to his own use; that he afterward refused to pay the note, whereupon appellant tendered him back his note and demanded his horse, etc.

To this replication a general demurrer was filed and sustained by the court, and upon the trial that followed all the instructions of the

¹ Upon the authority of the above decision, it was *held*, in *Doran v. Smith*, 1877, 49 Vermont, 353, that infancy is a defence to an action on the case against the vendor of a chattel for false and fraudulent representations as to his ownership of the chattel. — Ed.

² Statement and arguments omitted. — Ed.

appellant based upon the theory of his replication were refused, and a verdict and judgment for the appellee followed.

Counsel for appellee cite a number of authorities upon the question of a minor falsely representing himself to be of full age, but we fail to see their application, except as authority to sustain the demurrer to the second count of the declaration, and as to the propriety of that ruling of the court we do not feel called upon to express an opinion.

The second replication is based entirely upon the alleged fraudulent intent existing in the mind of the appellee, at the time of the pretended purchase, of never paying for the property.

We are also referred by counsel for appellee to the following authorities as conclusive against the right of recovery in the present case:

Cooley on Torts, pp. 109, 110, says:

"There are some cases, however, in which an infant cannot be held liable as for a tort, though *on the same state of facts* a person of full age and legal capacity might be. The distinction is this: If the wrong grows out of contract relations, and the real injury consists in the non-performance of a contract into which the party wronged has entered with an infant, the law will not permit the former to enforce the contract indirectly, by counting on the infant's neglect to perform it or omission of duty under it as a tort. The reason is obvious. To permit this to be done would deprive the infant of that shield of protection which, in matters of contract, the law has wisely placed before him." *Id.* pp. 106, 197.

Chancellor Kent says: "The fraudulent act, to charge him, must be wholly tortious, and a matter arising *ex contractu*, though infected with fraud, cannot be changed into a tort in order to charge the infant in trover, or case, by a change in the form of the action." 2 Kent's Com. p. 277, 10th Ed.

But this case as presented by the replication does not consist in a failure to perform a contract, but alleges that appellee became possessed of the horse by fraudulently going through the forms of a contract of purchase, when, in fact, no contract was ever made. In *Farwell v. Hanchett*, 120 Ill. 577, our Supreme Court, while holding that one purchasing goods with an intent not to pay for them gets no title, uses the following language: "The fraudulent vendee is not considered as a purchaser of the goods, but as a person who has tortiously got possession of them."

If an infant vendee obtains possession of goods through the pretense of a purchase, but intending at the time not to pay for them, there is, in fact, no contract executed between himself and his vendor. Their minds never meet. The transfer of possession as made by the vendor is based upon a supposed contract of sale, while such possession is received by the vendee fraudulently and tortiously. If the vendor knew the secret intentions of the vendee, he would no more surrender his property than he would to one seeking to take it from him by violence and without right. Hence, an action to recover damages for

such a tort is not an attempt to enforce the contract indirectly by counting on the infant's refusal to perform it, for no contract existed; but a recovery is sought for the damages occasioned by the wrongful and fraudulent act of the infant.

Such a case is to be distinguished from one where an infant vendee, by virtue of an agreement, made at the time in good faith, to purchase and pay for goods, acquires their possession, and when sued for the purchase price pleads his infancy to defeat a recovery. In the latter case he has made a contract, which he may legally avoid if he desires; but in the former he neither made nor intended to make any contract, but obtained the possession of the property by fraud. Tyler on Infancy and Cov. page 183, sec. 125; *Rice v. Boyer*, 108 Ind. 479; *Kellogg v. Turpie*, 93 Ill. 266.

We think the demurrer to the second replication should have been overruled.

The judgment of the Circuit Court will be reversed and the cause remanded.
Reversed and remanded.

MATHEWS v. COWAN AND HAVEN.

1871. 59 Illinois, 341.¹

APPEAL from the Circuit Court of Cook County; the Hon. E. S. WILLIAMS, Judge, presiding.

This was an action on the case, with a count in trover, brought by the appellants against the appellees, for the conversion of three hundred barrels of flour delivered to the latter by the former, December 3, 1870, as upon a sale for cash, but not paid for, the appellees having given therefor a check for \$1473, on the Manufacturers' National Bank of Chicago, which check was dishonored, and by reason of such dishonor, and the insolvency of the appellees, the flour being lost to appellants.

The special count in the declaration alleges, in substance, that on the 3d day of December, 1870, the defendants, knowing themselves to be insolvent, but wrongfully intending to defraud the plaintiffs of the flour, fraudulently induced the plaintiffs to deliver the same to defendants, on the false and fraudulent pretense of the latter that they would pay therefor on delivery; in pursuance of which false and fraudulent pretense, defendants drew said check, payable on demand, and fraudulently and deceitfully delivered it to plaintiffs, as and for a good check, the defendants knowing that it was not good and would not be honored; that the check was dishonored, defendants having no funds in bank to meet it, and was and is worthless, whereby the flour became lost to plaintiffs, etc.

¹ Statement abridged from opinion. — Ed.

Upon the trial evidence was introduced for the plaintiffs, sustaining the above allegations.

Haven, of the firm of Cowan & Haven, was the person who procured the delivery of the flour by giving a check which he knew to be worthless. Haven was a minor.

The following instruction was given for the defendants, and excepted to:

“The jury are instructed, that it is the intention of the defendant, Haven, when he bought this flour of the plaintiffs, on the 23d day of November, that is, whether he expected or intended to pay for the flour when he bought it, or whether he intended to cheat the plaintiffs out of it, which is to determine the defendant Haven’s liability in this case, and not what transpired on the 3d day of December, when this check was given; and if the jury find, from the evidence, that Haven was a minor, and bought this flour in good faith, and in the usual course of business, and with a reasonable expectation of paying for the same, then the jury should find the defendant Haven not guilty.” [Remainder of instruction omitted.]

The court refused to instruct the jury (in substance), that the plaintiffs could recover upon proving the allegations of the special count; but added, as an essential condition to recovery, that the jury must find that Cowan & Haven contracted with the plaintiffs for the flour with the fraudulent intention, at the time, of cheating the plaintiffs out of the flour, and that the defendants gave the worthless check in pursuance of such fraudulent intention.

Dent & Black, for appellants.

Hervey, Anthony & Galt, for appellees.

SHELDON, J. [After stating the case.] Among the errors assigned, are the giving of the foregoing instructions, with others of like import. They are erroneous, in requiring that the supposed fraud should have been meditated at the time of the contract for the purchase of the flour, on the 23d day of November. That is not the case made by the declaration. It complains of no fraud as practiced, or intended, at the time of making the contract of purchase, but only charges, that on the 3d day of December, the delivery of the flour was obtained by fraudulent contrivance. There might have been entire fairness in the making of the contract to purchase on the 23d of November, and an honest purpose then to pay for the flour on delivery; and yet, on the 3d day of December, a gross and actionable fraud might have been practiced in getting possession of the flour without paying for it, under a fraudulent pretense of doing so.

The position is taken by the appellee’s counsel, that the basis of the action was a contract, and that, as Haven was an infant, he is exempt from liability; and a class of authorities is cited to the effect, that though, for mere torts, an infant is legally liable as an adult is, the fraudulent act to charge him must be wholly tortious; and a matter arising *ex contractu*, though infected with fraud, can not be changed

into a tort in order to charge the infant in trover or case, by a change in the form of the action.

But we do not regard this case as one at all embraced within the scope of those authorities. Although it arose in the carrying into execution a contract, the transaction, as here complained of, was not really a contract, but we must regard it as a mere tort; and so long as an infant is held responsible for his torts and frauds, we must hold him responsible in damages upon the facts set out in the special count of the declaration.

Error in giving the above instructions, we deem sufficient ground for reversing the judgment, which was for the defendants.

The instructions in the case, given and refused, are voluminous, which it is not thought worth while to consider severally.

In particularizing the above, however, we would not be understood as impliedly sanctioning the others that were given for the defendants, or the refusal of other ones asked by the plaintiffs.

For instance, those asked by the plaintiffs, asserting the right of recovery in case the check was given, knowing it not to be good, we think should have been given. Such conduct would have amounted to a fraud and imposition upon the plaintiffs, which the defendants should not take advantage of, to hold the property as against the plaintiffs, on the plea of infancy in Haven, who gave the check, or that Cowan did not participate in the transaction—the flour having gone to the use of the partnership.

And we perceive no substantial objection to the instruction asked by plaintiffs, allowing a right of recovery under the count in trover, without reference to any intentional fraud, in case the sale was for cash, and the defendants appropriated to their own use the flour, without payment of the price, and without any waiver by plaintiffs of the condition of payment on delivery.

[Remainder of opinion omitted.]

Judgment reversed.

JOHNSON v. PIE.

17 Charles 2. 1 Levinz, 169.

CASE, for that the Defendant being an Infant, affirmed himself to be of full Age, and by Means thereof the Plaintiff lent him 100*l.* and so he had cheated the Plaintiff by this false Affirmation: After Verdict for the Plaintiff on Not guilty, and 100*l.* Damages, 'twas moved in Arrest of Judgment that the Action would not lie for this false Affirmation; but the Plaintiff ought to have informed himself by others, and cited *Grove* and *Nevill's* Case, to be adjudged in this Court in Easter Term, 16 Car. 2 Rot. 400, where in Case against an Infant for selling a false Jewel, affirming it to be a true one, 'twas adjudged the Action did not lie: To

which 'twas answered, That this is a Trespass on the Case, and an Infant is chargeable for Trespasses, though not for Contracts. *Kelynge* and *Wyndham* held, That the Action did *not* lie, because the Affirmation being by an Infant was void; and it is not like to Trespass, Felony, &c, for there is a Fact done. *Twysden* doubted, for that Infants are chargeable for Trespasses, *Dyer*, 105, and so if he cheated with false Dice, &c. But 'twas adjourned.

But see 1 *Keb.* 905, 913. Judgment arrested.

FITTS v. HALL.

1838. 9 *New Hampshire*, 441.¹

CASE. The declaration alleged, that on the 26th day of May, 1830, the plaintiff owned and was possessed of a large quantity of palm-leaf and chip hats — that a conversation was then had between the parties about the defendant's purchasing the hats of the plaintiff — that the plaintiff, not knowing whether the defendant was of age, enquired of him whether he was of full age or not; and that the defendant, well knowing that he was an infant under the age of twenty-one years, and intending to deceive and defraud the plaintiff, falsely and deceitfully represented that he was then of full age; and that thereupon the plaintiff, confiding in that representation, sold and delivered the hats to the defendant, on a credit of six months, and took his note therefor, on that time, for the sum of \$57. The declaration further set forth, that the note not being paid when due. the plaintiff sued the defendant thereon, and duly entered and prosecuted his action — that the defendant pleaded first the general issue, and secondly, infancy — that the plaintiff joined the general issue, and to the plea of infancy replied that the defendant, at the time of giving the note, represented himself to be of full age, &c. — that to this replication there was a demurrer and joinder, and it was considered by the court that the replication was bad and insufficient; and thereupon the plaintiff became nonsuit, and the defendant recovered judgment for his costs, taxed at \$37.62; and that the defendant, by his said false and deceitful affirmation, obtained possession of said hats, and deceived and defrauded the plaintiff, and has never paid said note, nor re-delivered the hats to the plaintiff, nor paid him therefor.

There was also a count in trover for the hats.

The plaintiff on the trial introduced evidence in support of the allegations in the first count.

The court instructed the jury, that if they were satisfied, from the plaintiff's evidence, of the truth of the facts set forth in the declaration,

¹ That part of the opinion which relates specially to the count in trover may be found, *ante*, p. 215. — ED.

they might, for the purpose of this trial, consider the action sustainable in point of law; and that, if they found a verdict for the plaintiff, they might find such an amount as would indemnify the plaintiff for the loss he had sustained in consequence of the defendant's false and fraudulent representations.

The jury found a verdict for the plaintiff, for \$128.91; whereupon the defendant moved that the verdict be set aside, and a nonsuit entered.

Christie, for defendant.

[Argument omitted.]

J. P. Hale, and *James Bell*, for plaintiff.

[Citations omitted.]

PARKER, C. J. The general principle applicable to this case is, that an infant is liable in actions *ex delicto*, whether founded on positive wrongs, or constructive torts, or frauds. 2 Kent's Com. 197; 1 Chitty's Pl. 65.

Thus he is liable in trover, although the goods converted were in his possession by virtue of a previous contract. 6 Cranch's Rep. 231, *Vasse v. Smith*; 3 Pick. 492, *Homer v. Thwing*. And in detinue, where he received skins to finish, and afterwards withheld them. 4 Bos. & Pul. 140, *Mills v. Graham*. And assumpsit for money had and received, has been sustained against an infant for money embezzled. 1 Esp. Rep. 172, *Bristow v. Eastman*; Peake's Rep. 222 S. C.

But a matter of contract, or arising *ex contractu* and properly belonging to that class, is not to be turned into a tort, in order to charge the infant by a change of the form of action. 2 Kent's Com. 197. As, for instance, where the plaintiff declared that having agreed to exchange mares with the defendant, the defendant, by falsely warranting his mare to be sound, well knowing her to be unsound, falsely and fraudulently deceived the plaintiff, &c.; held that infancy was a good plea in bar. 2 Marshall's Rep. 485, *Green v. Greenbank*; 4 E. C. L. Rep. 375.

[After stating *Jennings v. Rundall*, 8 D. & E. 335.] It is undoubtedly true, that the substance of all the matter thus alleged in the plaintiff's declaration, in *Jennings v. Rundall*, might have been set forth in an action of assumpsit; and regarding it, as Lord Kenyon did, as an injury resulting from an accident, it would seem to be an attempt to convert an action founded on contract into a tort. But the attention of the court does not seem, in the opinion delivered, to have been directed to the question whether part of the matter thus alleged might not, upon proper proof, have sustained the count in trover, which was also contained in the declaration, or an action of trespass.

It is apparent, from the cases before cited, that an infant may be charged for a tort arising subsequent to a contract, and so far connected with his contract that but for the latter the tort would not have been committed. In *Homer v. Thwing* the defendant hired a horse to go to a place agreed on, but went to another place, in a different direction, and he was held liable in trover for an unlawful conversion.

[After stating *Campbell v. Stakes*, 2 Wendell, 137.]

The principle to be deduced from these authorities seems to be, that if the tort or fraud of an infant arises from a breach of contract, although there may have been false representations or concealment respecting the subject matter of it, the infant cannot be charged for this breach of his promise or contract, by a change of the form of action. But if the tort is subsequent to the contract, and not a mere breach of it, but a distinct, wilful and positive wrong of itself, then, although it may be connected with a contract, the infant is liable.

Upon this principle the count in trover, in this case, cannot be supported, upon the evidence offered. [The opinion on this point is given, *ante*, p. 215.]

The next question is, whether this action can be maintained against the defendant, for the fraudulent representation that he was of age, by reason of which the plaintiff was induced to sell him the hats, on a credit, and to take his note.

An action may be maintained for false and fraudulent representations, in order to induce a party to sell, and whereby he was induced to sell, goods to one of the defendants, on a credit. 3 Pick. R. 33, 36, *Livermore v. Herschell*.

[The learned Judge here stated *Johnson v. Pie*, 1 Lev. 169.]

If this case be sound, the present action cannot be sustained on the first count. From a reference in the margin, it seems that the same case is reported, 1 Sid. 258. Chief Baron Comyns, however, who is himself regarded as high authority, seems to have taken no notice of this case in his Digest, "Action on the case for Deceit," but lays down the rule that "If a man affirms himself of full age when he is an infant, and thereby procures money to be lent to him upon mortgage," he is liable for the deceit; for which he cites, 1 Sid. 183. Com. Dig., Action, &c. A. 10.

We are of opinion that this is the true principle. If infancy is not permitted to protect fraudulent acts, and infants are liable in actions *ex delicto*, whether founded on positive wrongs, or constructive torts, or frauds, (2 Kent, 197) as for slander, (Noy's Rep. 129, *Hodsmen v. Grissel*,) and goods converted, (*auth. ante*) there is no sound reason that occurs to us why an infant should not be chargeable in damages, for a fraudulent misrepresentation, whereby another has received damage.

In the argument of *Johnson v. Pie*, Grove and Nevill's case was cited, "where, in case against an infant, for selling a false jewel, affirming it to be a true one, 'twas adjudged the action did not lie," and the case seems to have been considered as if the affirmation that he was of age was to be regarded as part of the contract. But there is a wide difference between the two cases. In Grove & Nevill's case the subject matter of the contract was the jewel which was sold. The affirmation that it was a true one was a false warranty of the article sold. If the defendant had been of age, *assumpsit* might have been maintained.

The infant was not to be charged, by adopting a different form of action. But the representation in *Johnson v. Pie*, and in the present case, that the defendant was of full age, was not part of the contract, nor did it grow out of the contract, or in any way result from it. It is not any part of its terms, nor was it the consideration upon which the contract was founded. No contract was made about the defendant's age. The sale of the goods was not a consideration for this affirmation or representation. The representation was not a foundation for an action of assumpsit. The matter arises purely *ex delicto*. The fraud was intended to induce, and did induce, the plaintiff to make a contract for the sale of the hats, but that by no means makes it part and parcel of the contract. It was antecedent to the contract; and if an infant is liable for a positive wrong connected with a contract, but arising after the contract has been made, he may well be answerable for one committed before the contract was entered into, although it may have led to the contract.

It has been said that "all the infants in England might be ruined," if infants were bound by acts that sound in deceit. But this cannot be a reason why the action should not be maintained for fraudulent wrongs done, for the same reason would seem to apply equally well in cases of slander, trover, and trespass. The latter are as much the results of indiscretion as the former, and quite as likely to be committed.

In Bac. Abr., Infancy, I, 3, it is said — "Also, it seems, that if an infant, being above the age of discretion, be guilty of any fraud in affirming himself to be of full age, or if by combination with his guardian, &c., he make any contract or agreement, with an intent afterwards to elude it by reason of his privilege of infancy, that a court of equity will deem it good against him according to the circumstances of the fraud." 3 Gwillim's Bac. 604. The authorities cited do not seem to state, specifically, the first branch of the proposition in the text; but there are several cases sustaining the general proposition that an infant may be bound, in equity, by a contract which the other party has been induced to enter into by his fraudulent representation or concealment. 2 Ves. sen. 212, *Lord Teynham v. Webb*; 2 Eq. Cas. Abr. 489, *Evroy v. Nicholas*, and case cited; 1 Brown's Ch. Rep. 358, *Beckett v. Cordley*; Fonblanque's Eq. (4 Am. ed.), 80, note z. At law, he is not bound by the contract, although it was procured by his fraudulent representation that he was of full age. 1 Johns. Cas. 127, *Conroe v. Birdsall*. If, in equity, the infant may be bound by the contract, because of his fraud in procuring it, he may well, at law, be answerable for the previous deceit through which it was procured, if he has thereby obtained the property of another and refuses performance on his part.

Our conclusion is that the action may be sustained on the first count.

But we are of opinion that the plaintiff is not entitled to recover, in damages, the costs of the action he commenced on the note, or those which he was obliged to pay in that suit. For aught which appears, he knew, when he commenced that action, that the defendant was an

infant, and would avail himself of his infancy. If he chose to try an experiment, he must abide the consequences. For this reason the verdict must be set aside, and a
New trial granted.

JENNINGS v. RUNDALL.

1799. 8 Term Reports (*Durnford and East*), 335.

THE first count in this declaration stated that the plaintiff on, etc., at the instance and request of the defendant delivered to the defendant a certain mare of the plaintiff to be moderately ridden by the defendant, yet that the defendant contriving and maleiciously intending to injure the plaintiff whilst the mare was in the defendant's custody under such delivery and before the same was returned to the plaintiff on, etc., wrongfully and injuriously rode, used, and worked the said mare in so immoderate, excessive, and improper a manner, and took so little and such bad care thereof, that by reason of such immoderate, etc., riding, etc., the said mare became and was greatly strained, damaged, etc. In the second count it was alleged that the plaintiff at the instance and request of the defendant let to hire and delivered to the defendant a certain other mare to go and perform a certain reasonable and moderate journey, etc., yet that the defendant contriving, etc., wrongfully and injuriously rode and worked the said mare a much longer journey, etc. There was also a count in trover for two mares.

The defendant pleaded his infancy to the two first counts, to which plea the plaintiff demurred.

Marryat, in support of the demurrer (after observing that it was immaterial whether or not infancy could be pleaded to the second count, because it being pleaded to both counts if it were a bad plea as to either count the whole plea was bad), contended that, as the first count was not founded on a contract, but on a tort, the defendant could not plead infancy to it. That that count did not state any consideration for the delivery of the mare by the plaintiff to the defendant, or any promise by the defendant to take care of her or to redeliver her; but that it appeared to be a delivery on bail to the defendant who had abused the plaintiff's property. That the tort here did not consist in mere neglect or omission, but in a tortious act done by the defendant. That the dictum in the books, that if the action arise out of the contract the plaintiff shall not by declaring in tort prevent the defendant pleading infancy, must be confined to cases where the wrong complained of consists in omission, or in some act which is a tort only by construction of law. That such was the ground of decision in *Grove v. Nevill*, 1 Keb. 778 (said in 1 Keb. 913, 914, to have been decided), where in an action upon the case in nature of a deceit on sale by the defendant of goods as his own, when in truth they belonged to another, the court

said: "This is no *actual* tort, or anything *ex delicto*, but only *ex contractu*." That in *Johnson v. Pie*, 1 Keb. 905, 913, and 1 Lev. 169, where the defendant had falsely and fraudulently asserted himself to be of full age, and had as such executed a mortgage to the plaintiff, and where it was holden that the defendant, an infant, was not answerable, the action was founded on the very contract in which the defendant had cheated the plaintiff: whereas here is a tortious act done by the defendant, and that too subsequent to the time when any supposed contract could have been entered into respecting the hire of the mare. He observed that an infant is answerable in an action for slander, Noy, 129, because there an act is done by the defendant; and in that case it was said that *malitia supplet etatem*; so here malice is laid. That in trover an infant is also responsible on account of the wrongful conversion subsequent to the bailment; though in most instances in trover the act is only a breach of trust or violation of some duty. And that even in an action of trespass for mesne profits he cannot plead infancy, though there he becomes a trespasser by construction of law. That if an infant wilfully destroyed anything that had been bailed to him, there is no doubt but that he would be liable in an action for the tort; and that this was in effect the same, because here he rendered a mare, that had been bailed to him, less valuable by his wrongful and injurious act.

Wood, contra, was stopped by the court.

LORD KENYON, Ch. J. The law of England has very wisely protected infants against their liability in cases of contract; and the present case is a strong instance to shew the wisdom of that law. The defendant, a lad, wished to ride the plaintiff's mare a short journey; the plaintiff let him the mare to hire; and in the course of the journey an accident happened, the mare being strained; and the question is whether this action can be maintained? I am clearly of opinion that it cannot; it is founded on a contract. If it were in the power of a plaintiff to convert that, which arises out of a contract, into a tort, there would be an end of that protection which the law affords to infants. Lord Mansfield indeed frequently said that this protection was to be used as a shield, and not as a sword; therefore if an infant commit an assault, or utter slander, God forbid that he should not be answerable for it in a court of justice. But where an infant has made an improvident contract with a person who has been wicked enough to contract with him, such person cannot resort to a court of law to enforce such contract. And the words "wrongfully, injuriously, and maliciously," introduced into this declaration, cannot vary this case.

GROSE, J. I am of the same opinion. In the case of *Manby v. Scott*, 1 Sid. 129, this distinction was taken, that if the action against an infant be grounded on a contract, the plaintiff shall not convert it into a tort; "If one deliver goods to an infant on a contract, knowing him to be an infant, the infant shall not be charged for them in trover and conversion; for by that mean all infants in England would be ruined." A very few years after the decision of that case the case of

Johnson v. Pie arose, according to one report of which Lord Ch. J. Keeling expressed great indignation at the attempt to charge an infant in tort for that which was the foundation of an action of assumpsit; he said, "The judgment will stay for ever, else the whole foundation of the common law will be shaken; for this was but a slip, and he might have pleaded his minority here."

LAWRENCE, J. The true distinction is that mentioned by my Brother GROSE, and not that stated at the bar, between negligence and an act done by the infant. It is argued that if no act be done by the infant he may plead his infancy, but that infancy is not a defence where an act has been done; if that were so, an infant would not be liable in many instances of trover, where the conversion consists merely in a non-delivery; and yet in trover an infant is always liable. According to the same rule, if an action were brought against an infant for negligently keeping the plaintiff's cattle, by which they died, infancy might be pleaded in bar; but if the declaration charged the defendant with having given the cattle bad food, by which they died, it could not. But this certainly is not the true distinction.

LE BLANC, J. The plea of infancy is a good bar to this action, on the ground that the act done in this case is the foundation of an action of assumpsit. And the reason of the distinction taken in the case in *Sidersin* is, that the plaintiff shall not by changing the form of the action vary the liability of the infant. Now if the plaintiff could not have maintained an action of assumpsit against the infant, neither can he maintain the action in its present form. On this short ground, therefore, I think that the plea of infancy is a good defence to this action.

Judgment for the defendant.

BURNARD v. HAGGIS.

1863. 14 *Common Bench, New Series*, 45.¹

ERLE, C. J. The question is whether, under the circumstances stated by the judge of the County Court, the plaintiff or the defendant is entitled to judgment. It appears that the defendant went to the stables of the plaintiff and contracted for the hire of a mare for a ride on the road, being told specifically that it was not let for jumping, — the charge for a horse for that purpose being a guinea, whereas the sum to be charged for a ride was only seven shillings. The defendant having obtained the mare, lent her to his friend, who so conducted himself that the animal, being forced to a leap she was not equal to, fell and was transfixed by a hedge-stake. This was an absolute wrong on the part of the defendant, for which he is unquestionably liable, quite independently of the question of necessary or no necessary.

¹ Statement and argument omitted. — ED.

WILLES, J. I am of the same opinion. It appears to me that the act of riding the mare into the place where she received her death-wound was as much a trespass, notwithstanding the hiring for another purpose, as if, without any hiring at all, the defendant had gone into a field and taken the mare out and hunted her and killed her. It was a bare trespass, not within the object and purpose of the hiring. It was not even an excess. It was doing an act towards the mare which was altogether forbidden by the owner.

BYLES, J. I am of the same opinion. The rule is plain, both as to married women and infants, that you cannot by suing *ex delicto* change the nature and extent of their liability. Here, however, the mare was let for the specific purpose of a ride along the road, and for the purpose of being ridden only by the defendant. The defendant not only allows his friend to mount, but allows him to put the mare to a fence for which he was told she was unfit. Quite independently, therefore, of the question of necessities, the defendant is clearly responsible for the wrong done.¹

KEATING, J., concurred.

Judgment for respondent [original plaintiff].

CAMPBELL v. STAKES.

1828. 2 *Wendell* (New York), 137.²

IN the Court of Errors; upon error from the Supreme Court.

Sarah Stakes, in July, 1821, commenced an action of *trespass* in the Common Pleas of New York, against Samuel Campbell and Thomas Campbell, and declared against them, for that on the *fourth of July*, 1820, they drove a certain mare belonging to the plaintiff with such violence, and whipped and cruelly treated her in such manner, that she died. Samuel Campbell alone was taken on the process issued against the defendants. He appeared by guardian, and pleaded, 1. *Non cul.*; 2. That at the time when, &c., the mare was in the possession of the defendants by virtue of a contract of bailment, whereby the plaintiff had let the mare and a *tilbury* to the defendants for hire, averring that at the time of the making of the contract, and also at the time of the supposed trespasses, the defendants were respectively infants within the age of 21 years. The plaintiff demurred to the second plea, the defendant joined, and the Common Pleas gave judgment for the de-

¹ During the argument, counsel for defendant having cited *Jennings v. Rundall*, BYLES, J., said: "In that case, the mare was ridden along the road; but here, she was put at a fence in defiance of the caution of the livery-stable keeper that she was not a jumper and was not let for that purpose. To use the mare as he did, was an act of tort just as distinct from the contract as if the defendant had run a knife into her and killed her." — ED.

² Arguments and part of opinion omitted. — ED.

pendant. The plaintiff removed the record into the Supreme Court by writ of error; and in August, 1825, the judgment of the Common Pleas was reversed, and judgment for costs taxed at \$95.42, given in favor of the plaintiff in error in that court, and a *venire de novo* awarded. At the ensuing term, Campbell applied for and obtained leave to amend his plea (5 Cowen, 21), when he plead, 1. *Non cul.*; 2. That the mare, at the time when, &c. was in the possession of the defendants by virtue of a contract of bailment for hire; and that the supposed beating, fatiguing by over-driving, &c. occurred and took place through the unskilfulness, want of knowledge, discretion, and judgment of the defendants; and that, on the termination of the contract of bailment, the defendants returned and re-delivered to the plaintiff the mare in full life; and averred that at the time of the bailment, and of the committing of the supposed trespasses, the defendants were respectively infants, &c., concluding with a verification and prayer of judgment. The plaintiff replied *prechudi non*, because the said S. Campbell, of his own wrong, and without the cause by him in his plea alleged, and with force and arms, &c. did commit the said several trespasses, &c. in *modo et forma*, &c.; and *further*, that at the time when, &c. the defendant was of full age, concluding to the country with similiter. In November, 1826, the cause was tried at the New York Circuit, and the jury found the defendant *guilty* of the premises laid to his charge in manner and form, &c. and assessed the damages of the plaintiff at \$200, but took no notice of the issue on the plea of infancy. On this verdict, a judgment was entered in the Supreme Court.

In June, 1827, John Campbell, the *administrator* of Samuel Campbell, who was deceased, brought a writ of error, removing the record from the Supreme Court into this court. Besides the general assignment of error that the declaration is insufficient, &c. the plaintiff specially assigned for error the reversal of the judgment of the Common Pleas, alleging that the same ought to have been affirmed. The defendant pleaded in *nullo est erratum*.

J. Platt, for plaintiff in error.

J. Anthon, for defendant in error.

WALWORTH, Chancellor. The first point made by the plaintiff is, that the action should have been case, and not trespass. If the object of this point is to support the first error assigned, to wit, that the declaration is insufficient, it certainly cannot be sustained.

The declaration is in the ordinary form of a declaration in trespass, and I can see no objection to it, either in form or substance. But I presume this point was intended to apply to the case made by the special plea of the defendant in the court below. I am satisfied an action on the case cannot be maintained against an infant under such circumstances. If the infant was liable at all, trespass was the proper form of action. An action on the case necessarily supposes the defendant to have a right to the possession of the property under the contract of hiring, at the time the injury is committed. Independent of the contract

of hiring, the defendant would have no right to the possession, and trespass would be the proper remedy. If the plaintiff declares in case, he affirms the contract of hiring, and the plea of infancy is a good defence to such an action;¹ for he cannot affirm the contract, and at the same time, by alleging a tortious breach thereof, deprive the defendant of his plea of infancy. The cases of *Jennings v. Rundall* (8 Term Rep. 335,) and *Green v. Greenbank* (4 Eng. Com. Law Rep. 375, 2 Marsh. Rep. 485,) were cases of that description.

The contract of an infant is not void, but is voidable at the election of the infant. If a horse is let to him to go a journey, there is an implied promise that he will make use of ordinary care and diligence to protect the animal from injury, and return him at the time agreed upon. A bare neglect to do either, would not subject him or an adult to an action of trespass, the contract remaining in full force. But if the infant does any wilful and positive act, which amounts to an election on his part to disaffirm the contract, the owner is entitled to the immediate possession. If he wilfully and intentionally injures the animal, an action of trespass lies against him for the tort. If he should sell the horse, an action of trover would lie, and his infancy would not protect him. The case of *Vasse v. Smith*, in the Supreme Court of the United States (6 Cranch's Rep. 226), was decided upon this principle. The special plea in the Court of Common Pleas was defective in not averring the fact, which was afterwards inserted in the amended plea, that the injury complained of occurred in the act of driving the mare through the unskillfulness and want of knowledge, discretion, and judgment of the defendant. With that averment, I think the plea of infancy, with the contract of hiring, would have been a complete answer to the action. But without such averment, I think the court were bound to presume it was a wilful injury, which would amount to an election by the infant to disaffirm the contract. I therefore am of opinion that the judgment of the Supreme Court on the pleadings as they stood was correct.

I am also of opinion that the defendant in the court below, by electing to amend his pleadings, waived his right to bring a writ of error on the judgment of the Supreme Court, founded on the original pleadings. If the cause had been originally commenced in the Supreme Court, the former pleadings would not have been found in the record. As the *venire de novo* was awarded in the Supreme Court, and these proceedings formed a part of the record of the Court of Common Pleas, which was brought into the Supreme Court by writ of error, it was perhaps necessary that the original pleadings should remain upon the record. But the election of the defendant to waive them by amending his plea, also forms a part of the record; and he cannot now take advantage of any error in the judgment of the Supreme Court, founded on the original pleadings.

¹ But see, *contra*, BELLOWS, C. J., in *Eaton v. Hill*, 1870, 50 N. H. 235, p. 241; also note in 18 Am. State Rep. p. 723. — ED.

The only remaining question is, can the plaintiff in error take any advantage of the defective finding of the jury on the issues arising out of the amended pleadings. I understood the counsel of the plaintiff in error to admit, on the argument, that this question had never been brought before the Supreme Court, by a motion in arrest of judgment, or otherwise. [It was *held*, that the objection could not now be raised in the Court of Errors. By the unanimous opinion of the court, the writ of error was dismissed.]

WILT v. WELSH.

1837. 6 *Watts* (Pennsylvania), 9.

ERROR to the Common Pleas of York County.

Charles Welsh against Peter E. Wilt. Declaration in trover to recover the price of a horse. Pleas, not guilty and the infancy of the defendant. To the latter plea the plaintiff demurred. The facts of the case, as given in evidence by the plaintiff, were, that the defendant had hired a horse from him, to ride to a particular place, and that he drove him to another and more distant place, in consequence of which the horse sickened and died. After much evidence was given on both sides as to the facts, the jury found for the plaintiff; and the court rendered a judgment on the demurrer for the plaintiff.

The error assigned was in rendering a judgment on the demurrer for the plaintiff.

R. J. Fisher, for plaintiff in error, cited 3 Rawle, 351; 4 Dall. 130; 6 Cranch, 226; 5 Mass. 104; 3 Starkie, 1493.

Ramsey and Evans, *contra*, 5 Mass. 104; 2 Wend. 137.

The opinion of the court was delivered by

GIBSON, C. J. It would have been sufficient to rest the decision of this cause on the precedent of *Penrose v. Curren*, if the point had not since been ruled differently by the Court of Errors of New York; but a respect for the opinion of that court, renders it proper to re-examine the question on principle and authority. The ground of the New York case (*Campbell v. Stakes*) is that a positive breach of the contract is a disaffirmance which works a dissolution of it and reduces the infant to a level with an adult who is chargeable with a conversion for any act which subverts the nature of the bailment. That would, indeed, bring the common-law principle of protection within a narrow compass; for there are few breaches of a bailment that are not subversive of it. The supposed act of subversion, in cases like the present, is the overworking of a horse or the otherwise abusing of the thing bailed, which, by the way, is at the same time an indisputable breach of the contract, and ground sufficient for an action on it. This being so, it remains to be seen whether an infant is chargeable for it in the shape of a tort

There are two cases (*Powell v. Layton*, 2 N. R. 365, and *Weall v. King*, 12 East, 452) in which it is maintained that even an adult is not.

[After commenting on various cases.]

But *Campbell v. Stakes*, though entitled to less authority merely as a decision, being the judgment of a popular court, yet distinctly enough discloses the foundation of the doctrine. The contract, it was justly said, comprises a promise to keep the thing from harm and return it at the stipulated time; for a negligent breach of which, it was admitted, the infant would not be liable as for a tort. But it was said that any positive act of injury inconsistent with the contract, would disaffirm it and leave him liable as if there had never been a contract. What is that but to make him a tortfeasor by construction? It is scarce maintainable, however, that a positive breach of the contract is an unqualified disaffirmance of it. Where the infant intended no disaffirmance, I am unable to see how the adult shall intend it for him, or insist that he rescinded the whole by perhaps an inconsiderable breach of a part. However convenient such a pretext might be to add a new responsibility to the predicament of the bailee or to extricate the bailor from an old one, it is to be remembered that the exercise of the privilege is not for the adult but the infant. I know nothing, nor did I ever before hear, of a constructive election to disaffirm in order to strip an infant of his privilege, and, by turning him from a contractor into a trespasser, to put him in a worse condition than if the contract had been indefeasible. Such a construction is not in keeping with the benign principles of the common law, which, in other cases, holds him only to such acts as are beneficial to him, and declares such as are positively detrimental to him to be positively void. Even were that otherwise, yet to give to an injury done to the thing bailed the character of an independent trespass, would require the bailment to have been first terminated; for the very foundation of the argument is, that the contract was out of the way at the time; but by the most attenuated construction, its cessation and the inception of the wrong, could be but simultaneous. On what principle, then, can it be a trespass? The distinction taken in the *Six Carpenters' Case*, 8 Co. 146, betwixt an authority given by the law, whose abuse makes the offender a trespasser from the beginning, and a license by the party, whose abuse does not, has never been questioned. The killing of a beast distrained by the grantee of a rent charge makes not the distress a trespass, because it is given by the grant and not by the law, 1 Inst. 141. The reason is that a party is entitled to the best protection the law can give against the abuse of an authority delegated not by himself but by the law, which, to that end, makes void every thing improperly done under it; while a party who gives an authority to an unsafe person has only himself to blame for it. 6 Wils. Bac. 561. Now taking for granted that the act annihilated the contract, it cannot be denied that there was a precedent license for an excessive use of which the infant is sought to be charged

as for a trespass; with what pretence of reason, when an adult could not be so charged, it is unnecessary to say. The theory on which a breach of contract has been thus turned into a trespass, is as incomprehensible to me as the theory on which a common recovery bars an entail; and why we should employ any juggle whatever to tear from an infant the defences with which the law has covered his weakness, is equally incomprehensible. In the American courts, the hardship of particular cases, as in the earlier decisions on the statute of limitations, seems to have run away with the law; but it is to be remembered that particular hardships are to be borne in giving effect to every general principle of policy. To fritter away the rule by exceptions such as these, would expose a child of the most tender years to an action for the destruction of a delicate or dangerous instrument thoughtlessly or wickedly put into his hands; for, in contemplation of law, an infant of three years is not inferior in discretion to one of twenty. The mischiefs to which minors are exposed from the cupidity of those whose trade it is to pamper their appetites, are sufficiently depicted in *Penrose v. Curren*; and we are not disposed to surrender the principle asserted in it. It is clear that the evidence of infancy ought to have been admitted; and that the court erred also in directing that if the infant hired the horse to go to a particular place and injured him by going beyond it, he was guilty of a conversion.

Judgment reversed, and a *venire facias de novo* awarded.

FREEMAN v. BOLAND.

1882. 14 *Rhode Island*, 39.

EXCEPTIONS to the Court of Common Pleas.

December 5, 1882. DUFFEE, C. J. The question here is whether an infant or minor who hires a horse and buggy to drive to a particular place, and who, having got them under the hiring, drives beyond the place or in another direction, is liable in trover for the conversion. We think he is. There are cases in which infancy has been held to be a good defence to an action *ex delicto* for tort committed under contract or in making it. But that is not this case. The act here complained of was committed, not under the contract, but by abandoning it; the bailment being thus determined.

The contract cannot avail if the infant goes beyond the scope of it. The distinction may be subtle, but it is well settled, and has been often applied in support of actions precisely like this. It is true the contract must be generally put in proof to support the action, but this is because the tort, inasmuch as it is committed by departing from the terms of the contract, cannot be shown without showing the contract.

and not because the contract is otherwise involved. *Homer v. Thwing*, 3 Pick. 492; *Towne et al. v. Wiley*, 23 Vt. 355; *Fish v. Ferris*, 5 Duer, 49; *Vasse v. Smith*, 6 Cranch, 226; *Green v. Sperry*, 16 Vt. 390; *Campbell v. Stakes*, 2 Wend. 137; Addison on Torts, § 1314.

We understand that the defendant does not ask us to decide the questions raised by the other exceptions, the exceptions being waived.

Exceptions overruled.

John D. Thurston, for plaintiffs.

George J. West, for defendant.

CHAPTER X.

LIABILITY FOR CRIME.

MARSH v. LOADER.

1863. 14 *Common Bench, New Series*, 535.

THIS was an action for a trespass and false imprisonment, brought by the plaintiff, an infant, by his father and next friend.

The defendant justified on the ground that the plaintiff was guilty of felony, whereupon he gave him into custody, and caused him to be carried before a magistrate. Issue thereon.

The cause was tried before KEATING, J., at the first sitting at Westminster in this term. It appeared that the plaintiff's father and the defendant were both builders living near each other; that the defendant had on several occasions missed pieces of wood from his premises; and that, on one occasion, he saw the plaintiff carry away a piece and take it into his father's house, whereupon he gave him into custody and caused him to be taken before a magistrate, who discharged him.

On the part of the plaintiff, it was proved that he was at the time of the transaction in question a month or two under seven years of age, and therefore, it was submitted, incapable of committing a felony.

The learned judge ruled that the plea was no answer to the action: and the jury returned a verdict for the plaintiff with £20 damages.

Powell now moved for a new trial, on the ground of misdirection, that the verdict was against evidence, and that the damages were excessive. He submitted, that, though a child under the age of seven years cannot be punished for a felony, there is no authority for saying that he may not lawfully be prosecuted. [ERLE, C. J. An infant under seven years of age cannot incur the *guilt* of felony.] Take the case of a lunatic, — he commits an act which in a sane person would be felony; he is put upon his trial, and acquitted on the ground of insanity: but, who ever heard of the prosecutor being sued for giving him into custody? Here, the child was discharged on the ground of his tender years: by parity of reasoning, the party giving him into custody should not be held liable to an action. In Hawkins's Pleas of the Crown 1, it is said that "the guilt of offending against any law whatsoever, necessarily supposing a wilful disobedience, can never justly be

imputed to those who are either incapable of understanding it, or of conforming themselves to it." "It is to be observed that those who are under a natural disability of distinguishing between good and evil, as, infants under the age of discretion [by the law of England seven years], idiots, and lunatics, are not punishable by any criminal prosecution whatsoever." And in the note (1) it is said: "Legal guilt is a violation of positive law; a crime or misdemeanor may, therefore, be defined the 'wilful' commission or omission of any acts in violation of a public law either forbidding or commanding it. This definition comprehends both crimes and misdemeanors, which are synonymous terms, though in common usage the word 'crimes' is made to denote offences of a deeper and more atrocious dye, while smaller faults and omissions of less consequence are comprised under the gentler name of 'misdemeanors:' Bl. Com. lib. 4, c. 1. But the act done or omitted, in order to be criminal, must be wilful. The consent of the will is that which renders human actions either commendable or culpable, and where there is no will to commit an offence there can be no transgression, saith Sir M. Hale (Hale P. C. c. 2). That learned judge then goes on to state those causes which the law of England notices as excusing the fact from incapacity or defect of will, which he classes as follows, — 1. Natural; 2. Accidental; 3. Civil incapacities or defects. The natural is that of infancy. The accidental defects of will are, — 1. Dementia; 2. Casualty or chance; 3. Ignorance. The civil defects or want of will, — 1. Civil subjection; 2. Compulsion; 3. Necessity; 4. Fear." [ERLE, C. J. That disposes of your plea.] Infancy should have been replied. At all events the damages are excessive. [ERLE, C. J. We cannot interfere on that ground.]

PER CURIAM. The ruling of the learned judge was perfectly correct, and we see no ground for finding fault with the verdict.

Rule refused.

REX v. ELIZABETH OWEN.

1830. 4 *Carrington & Payne*, 236.

INDICTMENT for stealing coals. The prisoner was ten years of age, and it was proved that, on the 28th of January, she was standing by a large heap of coals belonging to Messrs. Harford & Brothers, and that she put a basket upon her head. This basket was found to contain a few knobs of coal, which, in answer to a question put to her by the witness for the prosecution, she said she had taken from this heap.

LITLEDALE, J., was about to call upon the prisoner for her defence, when

Carrington, *amicus curiæ*, suggested that she was entitled to an

acquittal. He submitted that a child under seven years of age could not legally be convicted of felony; and that, in cases where the accused was between the ages of seven and fourteen, it was incumbent on the prosecutor to prove, not only that the offence was committed, but also that the offender had, at the time, a guilty knowledge that he or she was doing wrong.

LITLEDALE, J. I cannot hold that a child of ten years of age, is incapable of committing a felony. Many have [been] convicted under that age.

Carrington. No doubt that is so. A boy, named York, who was only ten years old, was convicted of a murder; but in that case there was the strongest evidence of guilty knowledge (Fost. 70).

LITLEDALE, J. I think I must leave it to the jury.

The prisoner was then called on for her defence.

LITLEDALE, J., (in summing up) said — In this case there are two questions; *first*, did the prisoner take these coals; and *secondly*, if she did, had she at the time a guilty knowledge that she was doing wrong. The prisoner, as we have heard, is only ten years of age; and, unless you are satisfied by the evidence that, in committing this offence, she knew that she was doing wrong, you ought to acquit her. Whenever a person committing a felony is under fourteen years of age, the presumption of law is, that he or she has not sufficient capacity to know that it is wrong; and such person ought not to be convicted, unless there be evidence to satisfy the jury that the party, at the time of the offence, had a guilty knowledge that he or she was doing wrong.¹

Verdict — Not guilty; and the foreman of the jury added, “We do not think that the prisoner had any guilty knowledge.”

Lumley, for the prosecution.

STATE v. YEARGAN.

1895. 117 North Carolina, 706.²

FAIRCLOTH, C. J. The defendant is indicted for playing and betting money at a game of chance, called “shooting craps” by throwing dice

¹ The law on this subject is very fully gone into in 1 Curw. Hawk. p. 1, n. 1; and is also treated of by Lord Hale, (1 H. P. C. ch. 3), and by Mr. Justice Blackstone (4 Com. ch. 2). It is believed that the youngest person who was ever executed in this country, was a boy between eight and nine years old, named Dean, who was found guilty of burning two barns at Windsor, “and it appearing that he had malice, revenge, craft, and cunning, he had judgment to be hanged, and was hanged accordingly.” This case was tried before WHITLOCK, J., at the Abingdon Assizes, 1629, and is reported in Emlyn’s Edit. II. P. C. p. 25, n. (u)

² Statement omitted. — ED.

with numbers. The jury rendered a special verdict and say that he did play and bet at such game. They also say he is over 13 and under 14 years of age; that he did not know he was violating any law, and that "he clearly knew the difference between right and wrong." His Honor held that defendant was not guilty and the State appealed.

An infant under 7 years of age cannot be indicted and punished for any offence because of the irrebutible presumption that he is *doli incapax*. After 14 years of age he is equally liable to be punished for crime as one of full age. His innocence cannot be presumed. Between 7 and 14 years of age an infant is presumed to be innocent and incapable of committing crime, but that presumption in certain cases may be rebutted, if it appears to the court and jury that he is capable of discerning between good and evil and in such cases he may be punished. The cases in which such presumption may be rebutted and the accused punished when under 14 years, are such as an aggravated battery, as in maim, or the use of a deadly weapon, or in numbers amounting to a riot; or a brutal passion, such as unbridled lust, as in an attempt to commit rape, and the like. In such cases, if the defendant be found *doli capax*, public justice demands that the majesty of the law be vindicated and the offender punished publicly although he be under 14 years of age, for malice and wickedness supply the want of age. Our case presents the question of a simple misdemeanor by one who, the jury say, knew right from wrong but did not know he was violating any law, and presumably had no intention of committing any offence. Among persons of full age ignorance of the law is no excuse, nor is the absence of any intent to violate it available as a defence, but it is the intent to do an act which is a violation of law that makes the actor guilty. In our examination of the early criminal law books, such as Blackstone, Russell, Hale and Wharton, we have been unable to find an instance in which, for a simple misdemeanor unattended with aggravating circumstances such as the above, an infant under 14 years has been indicted and punished. All the cases treated by those writers are felonies. The question it seems has not heretofore been presented to this court and the professional opinion has been that in all cases when capacity to distinguish right from wrong has been made to appear, the defendant may be punished although under 14 years of age.

In *State v. Pugh*, 7 Jones, 61, the question was not directly presented but was appropriately referred to by the court when Pearson, J., stated that "the wisdom of the common law is illustrated in the rule that for an ordinary assault and battery a boy under the age of 14 is not liable to indictment . . . and it is better to leave such matters to the correction which the parent or schoolmaster may in their discretion inflict, than to give importance to it by a public trial before a court and jury." In *Reg. v. Owen*, 4 Car. & P. 236, the defendant (ten years) was indicted for larceny, and Littledale, J., told the jury that "the defendant ought not to be convicted unless the evidence satisfies you that at the time of the act she had a guilty knowledge that she was

doing wrong and that the evidence should be strong and pregnant.” We think it better to adopt that rule of the common law with the limitations above indicated. *No Error.*

[The lists of cases heretofore given out for study (see *ante*, p. 236) included cases on “Procedure in Suits by, or against, Infants.” On account of want of space that topic is here omitted. For a good statement of the law, see Mr. Whitman’s article on Infants, in 10 Am. & Eng. Encycl. of Law, 1st ed., pp. 679-697. — ED.]

PART THIRD.

HUSBAND AND WIFE.

CHAPTER I.

HUSBAND AND WIFE AT COMMON LAW.

[The common-law doctrines as to the civil rights and liabilities of married persons no longer exist in full force in any jurisdiction. Those doctrines have been materially modified, and in many instances reversed, by modern legislation. Some knowledge of the old law is, however, still desirable; and for two reasons: First: There are few, if any, States in which the old doctrines are completely superseded. Second: A knowledge of the common law is requisite to a correct interpretation of the recent statutes. Without giving to the common law the same space that would have been proper sixty years ago, an attempt has been made to collect in this chapter cases which present an elementary outline of the old doctrines. But it should be added that one or two of the recent cases in this chapter, though professedly based upon the common law, can hardly be regarded as fully representing the old views. To some extent, these decisions seem due to the reflex action of legislation upon the minds of the judges. — ED.]

SECTION I.

Husband's Right in Wife's Chattels.

JORDAN v. JORDAN.

1864. 52 *Maine*, 320.

ON exceptions from *Nisi Prius*, RICE, J., presiding.

Assumpsit, for money had and received.

It appeared that the money in controversy was the money of the plaintiff before her marriage, in June, 1834, and was never reduced to possession by her husband during their marriage, but remained during that time under her sole control.

The defendant claimed the money as belonging to the estate.

The presiding judge instructed the jury that, if they believed from the testimony, that the plaintiff retained possession and control of the

money sued for, during coverture till the husband's death, then the money remained her property.

The verdict was for the plaintiff, and the defendant excepted.

Drummond, in support of the exceptions.

Verrill, contra, cited *Stanwood v. Stanwood*, 17 Mass. 57; *Fisk v. Cushing*, 6 Cush.

The opinion of the court was drawn by

APPLETON, C. J. By the common law, the personal property of the wife, which she had at the time of her marriage in her own right, such as money, goods, and chattels, vests immediately and absolutely in the husband, who can dispose of them as he pleases. On his death they go to his representatives, as being entirely his property. 2 Kent's Com. 135. "As to chattels personal, which the wife has in her own right, as *ready money*, jewels, household goods, and the like, the husband has therein an immediate and absolute property devolved to him by marriage, not potentially, but in fact, which never again can revest in the wife or her representatives." 2 Black. Com. 435. These doctrines of the common law have received the sanction of courts of the highest authority in this country. *Burleigh v. Coffin*, 2 Foster, 118; *Wheeler v. Moore*, 13 N. H. 478; *Hyde v. Strong*, 9 Cow. 230; *Blanchard v. Blood*, 2 Barb. 353; *Ames v. Chew*, 5 Met. 321; *Washburn v. Hale*, 10 Pick. 428; *Savage v. King*, 17 Maine, 301.

The choses in action of the wife do not thus vest absolutely in the husband. He must reduce them to possession in the lifetime of the wife. If not so reduced to possession upon his death, they belong to the wife and not to the representatives of the husband.

The instructions given were at variance with the rules of the common law, which had not been modified by legislation in 1834, and were erroneous.

How far existing statutes may affect the rights of the parties is not now before us, either upon the instruction requested or those given.

Exceptions sustained.

CUTTING, DAVIS, KENT, WALTON, and BARROWS, JJ., concurred.

SECTION II.

Husband's Right in Wife's Choses in Action. Husband's Right as Administrator of Wife's Estate.

WELLS v. TYLER.

1852. 25 *New Hampshire*, 340.

ASSUMPSIT. It was agreed by the parties that judgment should be rendered for either party, as hereinafter specified, according to the opinion of the court upon the following statement of facts:

On the 24th day of March, 1851, John Spaulding, the defendant's testator, died, having made his will, in and by which he devised and bequeathed to his daughter, Mary Wells, wife of the plaintiff, as follows: "I give and bequeath to my daughter, Mary Wells, wife of Philander B. Wells, one thousand dollars, to be paid to her or her heirs at the decease of my wife; except my wife shall think best to pay it, or cause it to be paid, or any part thereof, during her lifetime, to my said daughter. Also, twelve shares in the Lowell Bank, in Lowell, two shares in the Nashua Bank, at Nashua, one share in the Taylor's Falls Bridge Corporation, eight shares in the Vermont Central Railroad, three shares in the Passumpsic Railroad, and three shares in the Northern Railroad, to hold to her and her heirs forever."

At the time of the decease of said John Spaulding, the said Mary Wells, wife of the plaintiff, was living, and then was, and has ever since continued to be, an insane person. John Spaulding, at his decease, was the owner of the said shares, and the same have come into the hands of the defendant, as executor of his will. The plaintiff has duly demanded of the defendant the delivery and assignment to him of the shares, and the defendant has refused so to deliver and assign the same.

And it is agreed by the parties that all objections to the form of action and the sufficiency of the demand shall be waived, and that if the court shall be of opinion that the plaintiff is entitled to have and receive of the defendant an assignment and delivery of the shares by virtue of the provisions of the will, then judgment shall be rendered for the plaintiff for the sum of \$1,500, and costs; but if otherwise, then judgment to be rendered for the defendant, for his costs.

Stevens, for the plaintiff.

Atherton & Sawyer, for the defendant.

EASTMAN, J. The decision of this case lies within a very narrow compass. All exceptions to the form of the action and the sufficiency of the demand being waived by the agreement of the parties, the only questions presented for our consideration, arise upon the construction

to be given to the will of Spaulding, and the rights of the husband of the legatee.

There is no suggestion that the event upon which the \$1,000 were to be paid to the wife of the plaintiff, has yet arrived ; and there is no controversy between the parties in regard to that sum. The action is brought to recover only the shares in the several corporations.

The thousand dollars were dependent upon the life and decision of the testator's wife, but the shares he gave to his daughter the plaintiff's wife, "to hold to her and her heirs forever." The bequest of the shares was absolute and unconditional, without restriction in any way whatever. They were not given to her, for her sole and separate use, free from the interference and control of her husband, but "to her and her heirs forever." They do not, therefore, come within the decision of *Judge of Probate v. Hardy*, 3 N. H. Rep. 147, and of *Pierce and wife v. Dustin*, 4 Foster's Rep. 417. Nor are they affected by the provisions of the act of 1846.

A legacy to a wife does not vest absolutely in a husband. He has a right to reduce it to possession, or permit her to hold it to her separate use. If he does not exercise his rights over it, it survives to her in case of his death. If he survives her, he is entitled to administration, and to recover and receive a legacy or a distributive share in which she is interested, to his own use. *Parsons v. Parsons*, 9 N. H. Rep. 309, 321 ; *Marston v. Carter and Trustee*, 12 N. H. Rep. 159 ; *Tucker v. Gordon*, 5 N. H. Rep. 564.

And where a legacy is given in general terms to a wife, without restriction, the husband may reduce it to possession, or he may, for a valuable consideration, release or assign it by a deed to which she is not a party. *Pierce and wife v. Dustin*, before cited.

These authorities settle the matter, and there must therefore be,

Judgment for the plaintiff.

HOWARD AND WIFE v. MOFFATT.

1816. 2 *Johnson's Chancery (New York)*, 206.

THE bill stated, that the father of the plaintiff's wife died intestate, leaving five children, and a large real and personal estate ; that part of the real estate, by the consent of the plaintiff, and the proceeds of what had been sold, are in the hands of the defendant, who refused to account, &c. The bill prayed that the defendant might account, and pay over the money to the plaintiff.

The defendant (who is the brother of the plaintiff's wife), in his answer, admitted the death of the ancestor, and the estate, &c., and stated the personal estate had been duly distributed ; that most of the real estate had been sold ; that he had in his hands moneys belonging

to the wife of the plaintiff, amounting to 1,290 dollars and 90 cents; and that she had frequently requested him not to pay it over to her husband.

The master's *report* stated that there were 1,923 dollars and 77 cents due from the defendant; that it was proved before him, that the plaintiff was, by profession, a mariner, and poor; and that the defendant was a person of property, and a prudent man; that the wife of the plaintiff was examined, by consent, and stated, that she had always lived harmoniously with her husband, who was captured, some years ago, by a French privateer, and remained in Europe for five years, and was absent from New York seven years; that when he went abroad he left money sufficient to maintain her during the time he expected to be absent; but the sum, and the credit he had given her, were soon exhausted, and she was obliged to sell the plaintiff's furniture for her maintenance; that before and since the period of his absence she had been exclusively maintained by him; and during his absence he had corresponded with her by every opportunity; that, as the plaintiff was now out of business, and might prove unfortunate, she wished the defendant to keep her money, as it would be safer with him; and that she was, at present, maintained by the plaintiff.

The cause was now brought on for a final hearing.

D. B. Ogden, for the plaintiff, moved that the report of the master be confirmed, and that the defendant be decreed to pay over the money in his hands to the plaintiff. He stated that the real estate of the wife, still unsold, was worth 2,000 dollars, and was adequate to her support.

Riker, contra, insisted, that the money should remain in the hands of the defendant, on his giving good security, for the use of the wife and child. He cited 1 Madd. Ch. 384, 391; 3 Vesey, 168.

KENT, CHANCELLOR. The general rule is, that where the aid of the court is requisite to enable the husband to take possession of the wife's property, he must do what is equitable, by making a reasonable provision out of it for her maintenance and that of *her children*, and without that, the aid of the court will not be afforded him. The practice is, for the husband, on a reference, to make proposals of a settlement before a master, and, on the coming in of his report the court judges of its sufficiency. Whether the husband applies by himself, or a suit for the wife's debt, legacy, portion, &c., be brought by the legal representatives of the husband, as his executors, or assignees, the result is the same, and the aid of the court will not be afforded without a suitable settlement, unless, perhaps, the wife comes into court and on examination voluntarily waives any provision. It seems now to be understood (Sir Wm. Grant, in *Murray v. Elibank*, 13 Vesey, 1) that the wife may, at her option, waive any settlement, though, in one case, Lord Hardwicke still sternly insisted on a provision for her (*Ex parte Highham*, 2 Ves. 579), if indeed we may rely on a loose authority, and which was directly contrary to a prior and strong case in his time on that point. *Willats v. Cay*, 2 Atk. 67. The extent of the provi-

sion will depend upon the circumstances of each case. If the husband can lay hold of the property without the aid of a court of equity, it is understood that he may do it; the court has not the means of enforcing a settlement by interfering with his remedies at law. These are the general rules which have been established by a course of practice under this peculiar doctrine of the court, and which has been steadily and uniformly observed, for above a century past. Lord Keeper Wright, in *Oxenden v. Oxenden*, 2 Vern. 494; *Bosvil v. Brander*, 1 P. Wm. 459; *Jacobson v. Williams*, 2 P. Wm. 382; *Brown v. Elton*, 3 P. Wm. 202; *Jewson v. Moulson*, 2 Atk. 417; *Grey v. Kentish*, 1 Atk. 280; *Burdon v. Dean*, and *Oswell v. Robert*, 2 Ves. jun. 607, 680; *Brown v. Clarke*, 3 Vesey, 166; *Lumb v. Milnes*, 5 Vesey, 517, *vide* also 1 Vesey, 539, 1 Ves. and Beame, 300; and *Murray v. Eli-bank*, 13 Ves. 1.

In the case before me, there are sufficient reasons for requiring some provision for the wife out of the fund in question. Though there be real property of the wife still undisposed of, yet the husband has a life estate in it, and her residuary interest would not be very productive. The fact has also occurred, that she has been left for years unsupported by her husband, in consequence of his unavoidable absence; and it appears from the master's report, that his means of living are small, and the exercise of his maritime profession unusually hazardous. Under these circumstances, provision ought to be made for the wife out of the moneys now due to her from her father's estate, before the husband can receive the aid of the court.

I shall, therefore, suspend the decree, and recommend, in the mean time, that the amount of 1,000 dollars be secured for the wife and child, by an amicable arrangement between the parties, and that the residue be paid over to the husband. If this recommendation be not effective, I will then make some direction in the case.

N. B. The arrangement recommended took place, and the cause was not brought again before the court.

HAYWARD v. HAYWARD.

1838. 20 *Pickering (Massachusetts)*, 517.¹

THIS was an appeal [*Mary M. Hayward v. Ebenezer Hayward, Adm'r*] from a decree of the Judge of Probate.

By an agreed statement of facts it appeared, that in November, 1831, Seth Hastings died intestate, leaving three children, one of whom was the appellant, at that time the wife of Caleb Hayward; that letters of administration on the estate of the intestate were duly granted to William S. Hastings; that in March, 1832, before any dis-

¹ Arguments, and the greater part of the opinion, omitted. — ED.

tribution of the personal estate was decreed, Caleb Hayward died intestate; and that letters of administration upon his estate were granted to the appellee.

If upon these facts the court should be of opinion, that the appellee was entitled to a distributive share of the personal estate of Seth Hastings, the former accounts of administration settled by the administrator of Seth Hastings, were to be opened, and the decree of distribution made on the settlement of the first account, whereby a portion of the personal estate in the hands of the administrator was distributed among the three children of Seth Hastings, was to be reversed and a new distribution decreed and made. But if the court should be of opinion, that the appellant was entitled to a distributive share of such personal estate, then distribution was to be decreed, accordingly, of the balance remaining in the hands of such administrator after deducting therefrom the sum of \$2,000 which was to be afterwards accounted for by him.

W. S. Hastings, for appellant.

Washburn, for appellee.

DEWEY, J. The question to be decided in this case is, whether the share of personal intestate estate accruing in right of the wife during coverture vests absolutely in the husband, so that in the event of his death before the decree of distribution, the wife will not be entitled to it by survivorship.

It seems to be very clearly settled, and by a uniform current of authorities, that the distributive share in an intestate estate, immediately upon the death of the intestate, vests in the heir-at-law, and in case of his decease before a decree of distribution, the share belonging to him would go to his personal representative.

No objection therefore arises to the claim of property in the husband in the distributive share, from the fact, that he deceased before the making of the decree of distribution. But the decision of this point does not settle the general question of the right of survivorship in the wife. The question still recurs, does this interest in the distributive share accruing in the right of the wife during coverture so vest in the husband, that in the event of his decease without any act on his part reducing it to possession, it shall not survive to the wife?

The general rule as to *choses in action* which belong to the wife at the time of the marriage, is well settled. They do not vest absolutely in the husband. He acquires, by the marriage, only an inchoate right; he may reduce them to possession and take the avails of them; but if the wife survives the husband, and the choses remain uncollected, she is entitled to them, and they do not pass to his personal representatives.

The counsel for the administrator of the husband admits this to be the rule of law as to all choses in action thus situated; but he insists upon a different rule as to all choses and rights of action accruing during coverture, and claims that the latter, without being reduced to pos-

session, vests absolutely in the husband, and in the event of his death do not survive to the wife.

Can this distinction be supported upon principle or by the adjudged cases?

[After citing and commenting upon numerous authorities.]

If this question be an open one in this Commonwealth, it seems to me very clear, that the decided preponderance of authority in favor of the right of the wife should lead us to sustain that doctrine, unless it can be shown that these decisions are erroneous in principle. For myself, I cannot perceive any tenable ground for a distinction to be taken between choses in action accruing to the wife before or after coverture, as respects her right of survivorship. I can see a good reason why all her earnings should be entirely blended with her husband's. I can see some reason for the technical rule which requires, that the husband shall join his wife with him in all actions to enforce rights accruing to her before marriage, while he may or may not join her with him in actions, where the interest accrued to her during coverture; but here, as it seems to me, the distinction ceases, and as regards all rights acquired by devise, by the statute of distributions, or by gift from others, the rights of survivorship should be the same, whether the interest accrues before or after marriage.

This brings us to the inquiry, has this question been judicially settled in this Commonwealth and adversely to the rights of survivorship in the wife?

[Here the learned judge examined several Massachusetts cases.]

It seems to me, upon a careful review of all the cases in which this subject has been incidentally or otherwise, before this court, that the adjudications are not of so controlling and decisive a character as to preclude us from the full consideration of the question upon general principles and with reference to the decisions of other judicial tribunals and the opinions of learned commentators. The result of such a consideration of the question now presented for our adjudication is a full conviction on our minds, that there is no such distinction as to the rights of survivorship by the wife, between those choses in action that accrue before and those that accrue during coverture, as is claimed by the counsel for the administrator of the husband, but that in either case, if the husband die without reducing them to possession, they survive to the wife. Such I apprehend is the well settled law of England, and the same doctrine has been distinctly recognized in the States of New York, Pennsylvania, South Carolina, and Virginia. It has had the sanction of Lords Hardwicke and Tenterden in England, of Chief Justice Marshall, Chancellor Kent, and many other eminent jurists in this country.

The court are therefore of opinion, that the appellant, Mrs. Hayward, is entitled to the distributive share in the estate of her late father, which descended to her during coverture, her husband having deceased without reducing it to possession.

Decree in favor of the appellant

JUDGE OF PROBATE v. CHAMBERLAIN.

1824. 3 *New Hampshire*, 129.

THIS was an action of debt upon a probate bond, given by the defendant upon his taking upon himself the burthen of executing the will of Moses Chamberlain, deceased. The defendant was defaulted, and upon a hearing of the parties as to the sum, for which execution ought to be awarded, it appeared, that the said Moses, the testator, by his will, gave to his daughter Rhoda \$100, to be paid to her in one year after the decease of her mother. Rhoda, having married Lemuel Wheelock, died without issue, after the decease of her father, but before the decease of her mother, leaving several brothers and sisters. The mother of Rhoda died in the year 1819. The question was, whether the husband of Rhoda was entitled to the said legacy?

RICHARDSON, C. J. At the common law, administration of the estate of a person dying intestate, belonged of right to no particular person, but it was in the discretion of the ordinary to grant administration to whom he saw fit. But the statute of the 21 H. VIII. gave the administration to the next of kin; and when there happened to be more than one of equal akin, he, who first took administration, was entitled to the surplus of the personal estate, after paying the debts. The law thus remained, until, by the statute of 22 and 23 Car. II. cap. 10, administrators were made liable to make a distribution. But that statute made no express mention of a husband's administering to his wife; and as no person could be in equal degree to the wife with the husband, he was held not to be within the act. And the statute of 29 Car. II. cap. 3, sec. 25, expressly declared, that the husband might demand administration of his deceased wife's personal estate, and recover and enjoy the same, as he might have done before the statute of the 22 and 23 Car. II. cap. 10. Since that time, it seems never to have been doubted, that a husband may administer upon his deceased wife's estate, and that he is entitled, for his own benefit, to all her chattels real, things in action, trusts, and every other species of personal property, whether actually vested in her and reduced to possession, or contingent, or recoverable only by action. And in case the husband dies before he administers, the right to administer, and to the property, goes to the heirs of the husband. *Coke Litt.* 351, *note*; 6 *John.* 112, *Whitaker v. Whitaker*; 4 *Coke*, 51, *Oguel's case*; 1 *Wilson*, 168, *Elliot v. Collier*; *Roll's Ab.* 345; *Comyn's Digest*, "Baron & Feme," E. 3; *Orphan's legacy*, 248; *Bacon's Ab.* "Baron & Feme," C.; *Lovell's on Wills*, 2; *Wentworth*, 383; *P. Williams*, 380; *Cro. Car.* 106, *Johns v. Rowe*.

We are therefore of opinion, that the husband of Rhoda is entitled to the legacy given her by her father.

SECTION III.

Husband's Right in Wife's Earnings.

BUCKLEY v. COLLIER.

4 *William and Mary.* 1 *Salkeld*, 114.

BARON and Feme declared, that the defendant being indebted to them for work done by the wife, in making him a peruke, he promised to pay, and had not paid, *ad dampn. ipsorum, &c.* To this there was a frivolous plea, and upon that a demurrer. The plaintiff cited 3 Cro. 205; 3 Cro. 61, 96; 1 Cro. 438; but relied principally upon Burchet's case. *Per Cur.* Burchet's case differs: there was an express promise to the wife, and to that the husband assented by bringing an action thereupon: but here is no express promise laid to the wife; here is nothing but the promise in law, and that must be to the husband, who must have the fruits of his wife's labour, for which he may bring a *quantum meruit*. Also the advantage of the wife's work shall not survive to the wife, but goes to the executors of the husband; for if the wife dies, her debts fall upon the husband; and therefore so shall the profits of her trade to the husband's executors. But this must be intended of work done during the coverture, and not after.

Judgment pro def

SECTION IV.

*Tenancy by the Marital Right in Wife's Real Estate.*¹

ROBERTSON v. NORRIS.

1848. 11 *Queen's Bench* (*Adolphus & Ellis, N. S.*), 916.

COVENANT, by assignees of a lessor of land, against lessee. The declaration stated that one Mary J. S. Davis had become seised of the reversion in fee, as devisee of the lessor, that she had inter-married with one Reymer, and that thereupon Reymer and his wife, in right of his wife, became and were seised in their demesne as of fee of and in the said demised premises, expectant on the determination of the lease: it then alleged that, by indenture, etc., made between Reymer and his wife of the first part, Mary Davis her mother of the second part, and the plaintiffs of the third part, "Reymer granted, bargained, sold, and released unto the plaintiffs the said reversion of and in the said demised premises, to hold to the plaintiffs, their heirs and assigns," during the coverture.

2d plea. That "Reymer did not grant, bargain, sell, or release unto the plaintiffs the said reversion of and in the said demised premises," *modo et formâ*. Issue thereon.

On the trial, before WILLIAMS, J., at the Somersetshire Spring assizes, 1847, it appeared that the indenture of release had not been executed by the wife, and that the husband, who had executed it, was not tenant by the curtesy. It was thereupon objected that her reversion had not passed to the plaintiffs, and that the above issue on their part was not proved. The learned judge overruled the objection. Verdict for plaintiffs, with leave to move to enter a verdict for the defendant on this issue.

Crowder, in Easter term last, obtained a rule *nisi*, accordingly. In last Hilary vacation,²

Butt and *Barstow* shewed cause. The husband took a freehold interest during the joint lives of himself and his wife. This point is discussed in note (2) to Co. Lit. 326 a. "But though by our law a woman does not now communicate her rank or titles of honour to her husband, yet the freehold, or the right of possession, of all her lands of inheritance, vests in him immediately upon the marriage, the right of property still being preserved to her. 1 Inst. 351 a, 273 b. And

¹ Curtesy and Dower are omitted because these topics are dealt with in the course on Property at the Harvard Law School. — Ed.

² February 11th. Before LORD DENMAN, C. J., PATTESON, COLERIDGE, and WIGHTMAN, JJ.

see Pothier *Traité des Fiefs*, vol. i. p. 123.¹ This estate he may convey to another.

[Remainder of argument omitted.]

Crowder and Montague Smith, contra. By the argument for the plaintiffs, the wife is treated as altogether an unnecessary party to the deed of assignment. Yet the declaration itself states, as was necessary, that husband and wife in right of the wife were seised; and they must both have joined in an action for breach of covenant; 1 Bac. Abr. 729, 7th ed., tit. Baron and Feme (K).

[Remainder of argument omitted.]

Cur. adv. vult.

LORD DENMAN, C. J. A question arose in this case as to the interest which a husband takes in lands which belong to his wife in fee simple, and as to his power to convey to another person an interest in those lands for the joint lives of himself and wife.

It is laid down in Co. Lit. 351 *a* that he is entitled to the pernaney of the profits, and that, if he be attainted, that pernaney will pass to the Crown, the freehold still remaining in his wife. But it is also laid down in Co. Lit. 326 *a*, and in the notes, that he may make a tenant to the præcipe of his wife's land, and that he has an estate which he may convey to another. He has not, however, any greater interest than during the joint lives of himself and his wife.

Now the second issue raised by the pleadings in this case, which was an action of covenant on a lease made by a person who had afterwards devised to the wife, was, whether the husband did by indenture convey to the plaintiffs the reversion, of which he and his wife were seised in right of the wife, to hold to the plaintiffs during the coverture of the wife with the husband. This he certainly did. The indenture professed to be made by him and his wife, but was not executed by her; and it passed no more than his interest. That was an estate during the joint lives of himself and his wife, which was all that he professed to convey by the terms of the deed.

The rule to enter a verdict for the defendant on that issue must be discharged.

Rule discharged.

BEALE v. KNOWLES.

1858. 45 *Maine*, 479.

WRIT OF ENTRY. The material facts in the case as agreed upon, appear in the opinion of the court.

J. H. Webster, argued for plaintiff, and *B. Adams*, for defendant.

The opinion of the court was drawn up by

HATHAWAY, J. A writ of entry to recover a lot of land, upon which, April 30, 1855, the demandant duly levied his execution against Nathaniel D. Richardson, as his estate.

¹ See *Œuvres Posthumes*, tom. i., p. 50 (ed. 1777). Part. I., ch. 2, art. 2.

Richardson and Clarissa, his wife, were married in the summer of 1842, and are now living. In October, 1842, William King conveyed the demanded premises to Richardson's wife, and she, by her deeds of Oct. 21, 1846, and of March 12, 1853, in which deeds her husband did not join her, conveyed the same premises; under which deeds from her, through mesne conveyances, the tenant derives his title. When William King conveyed the land to the wife, her husband acquired therein a life estate. He became seized of the freehold, the usufruct was his during their joint lives. He had a lawful right to sell and convey his life estate. It was liable to be taken in execution for his debts. *Litchfield v. Cudworth*, 15 Pick. 23. The life estate was the husband's freehold. The inheritance belonged to the wife. Such was the law when Clarissa Richardson received her deed from William King, and her husband's rights therein were perfected simultaneously with hers, and those rights are not affected by the provisions of the statute of 1844, c. 117, entitled, "an Act to secure to married women their rights of property," nor by the subsequent additional and amendatory statutes upon that subject, which were all enacted after the rights of Richardson and his wife, in the demanded premises, had been established under the laws existing at the date of William King's deed to her. And, besides, her deed of Oct. 21, 1846, was void, because, being a married woman, she had no power at that time, in such case, to convey her land separate from her husband; and the statute of 1852, c. 227, only authorized the wife's separate deed of estates acquired subsequent to the Act of 1844, c. 117. Hence, her deed of March 12, 1853, being a deed of real estate acquired previous to 1844, was unauthorized by the statute, and therefore void.

The statute of February 12, 1855, c. 120, provided that, "any married woman seized and possessed in her own right of any real estate situated within this State, (might) sell, convey, and dispose of the same by her separate deed in her own name," and that "no action shall be maintained by the husband of any such married woman, or by any person claiming under or through him, for the possession or value of any property *held* or disposed of by her, as aforesaid," and the defendant's counsel insists that this action is thereby prohibited.

The deeds of the wife being inoperative, as before stated, the tenant shows no title. But, the tenant being in possession, the demandant cannot disturb him, unless he shows title, in himself, and *this* he has done. The demandant shows title by his levy, to the husband's life estate. The wife did not *hold* it; she was not "seized and possessed" of her husband's life estate, his freehold, of which he was seized. She could not join him in a suit for an injury to the profits of the land. 2 Kent's Com. 131. If he had sold and conveyed it, she could not lawfully enter or interrupt his grantee's possession during her husband's life. *Mellus v. Snowman*, 21 Maine, 201.

Tenant defaulted.

TENNEY, C. J., RICE, APPLETON, MAY, and DAVIS, JJ., concurred.

CLAPP v. STOUGHTON.

1830. 10 *Pickering* (Massachusetts), 463.¹

WILDE, J. The plaintiff claims as administrator of the estate of Ann Monk, and in her right as she was one of the heirs of Abigail Drake, who by the last will and testament of Lemuel Drake, her husband, was made the residuary devisee and legatee of his estate. A portion of his estate, real and personal, was given to the defendants upon a condition which has not been performed. In this portion of his estate a contingent interest vested in Abigail Drake, although the contingency upon which it depended did not happen until after her death. It was a vested right, subject to a contingency, which was transmissible to her heirs and representatives, and in them it became vested in possession on the forfeiture of the estate by the defendants. *Chauncy v. Graydon*, 2 Atk. 621; *Massey v. Hudson*, 2 Meriv. 133. After the death of Abigail Drake, the defendants' right became forfeited by their non-compliance with the condition, and the real estate has been recovered by her heirs. This action is now brought to recover Ann Monk's share of the personal estate or the legacy, and also of the profits of the real estate received by the defendants.

[This action was commenced, in 1829, by Ann Monk, who has since deceased. It is now prosecuted by Clapp as her administrator. Elisha Monk, the husband of Ann Monk, died in 1824. The profits of the real estate here sought to be recovered accrued while Ann Monk was the wife of Elisha Monk.]

[That part of the opinion which relates to the right to recover the personal estate is omitted.]

The claim for a share of the profits of the real estate depends on different principles, respecting which there are greater doubts. These profits all accrued after the death of Abigail Drake, and if Ann Monk had been unmarried at the time they accrued, this action might well lie. But it appears that at that time she was a feme covert, and the question is, whether the profits of her real estate during the marriage belonged absolutely to the husband, or as they were not actually reduced to possession by him, whether an action to recover them did not survive to the wife. It is somewhat surprising to find that this question does not appear to be entirely settled. There are conflicting opinions and decisions; and it would be but an unprofitable labor, I fear, to attempt to reconcile them. The better opinion seems to be, that these profits belonged absolutely to the husband; that he had a right to sue for them alone; and that no right of action survived to the wife. By the marriage the husband becomes the absolute owner of all the wife's personal property, and acquires a full and perfect title to the rents and profits of her real estate during the coverture. They are considered

¹ Statement and arguments omitted. — ED.

in law as one person, the husband being the head ; the wife, therefore, during the coverture, can make no contract to her own use, and if a note or bond is given to her, the property in it immediately vests in the husband. *Barlow v. Bishop*, 1 East, 432. And she can acquire no personal property in her own right, for if she obtains any, by gift or otherwise, it becomes immediately the property of the husband, though not in his possession. Com. Dig. Baron and Feme, E 3. The husband also has an absolute right to the services of the wife, and to all beneficial interests accruing thereby. The right to recover compensation for such services vests in the husband alone, and does not survive to the wife on the death of the husband. In an action, however, the husband may join the wife, and if judgment is recovered in their names, and she survives, the judgment will survive to her. The recovery of judgment in such a case operates as a contingent gift from the husband to the wife, to take effect if she should survive. *Oglander v. Baston*, 1 Verne, 396. The same doctrine applies to the rents and profits of the wife's real estate, and to actions of trespass on her lands during the coverture. The husband may sue alone, or according to the current of the authorities, the wife may be joined. Com. Dig. Baron and Feme, W and X. But it by no means follows, that because she may be joined in an action, the cause of action will survive to her, if she is not joined, or no action is brought during the life of the husband. I think the true rule is, that in all cases where the cause of action by law survives to the wife, the husband and wife must join, and he cannot sue alone. This rule will go further than any other, to reconcile all the cases. In all actions for choses in action due to the wife before marriage, the husband and wife must join ; and among all the conflicting cases, I apprehend not one can be found in which it was held that the husband could sue alone, where the cause of action would clearly survive to the wife. Now in the present case it seems to me well settled, that the husband of Ann Monk might have maintained an action in his own name for the profits of the real estate received by the defendants. The profits belonged to him, and they were received to his use ; so that the law implies a promise on their part to pay them over to him. But there was no promise, express or implied, to pay them over to the wife.

Plaintiff nonsuit.

SECTION V.

*Estate by Entireties.*DEN EX DEM. ELIZA HARDENBERGH v. JACOB R.
HARDENBERGH.1828. 10 *New Jersey Law* (5 *Halsted*), 42.¹

EWING, C. J. By deed of bargain and sale, bearing date on the 31st day of August, 1822, and made "between William M'Knight and Nancy his wife, of the county of Burlington, and State of New Jersey, of the first part, and James Hardenbergh and Elizabeth his wife, of the township of South Amboy, county of Middlesex and State of New Jersey, of the second part," the words, "and Elizabeth his wife," having been interlined after the deed was drawn and before it was executed, "the party of the first part," granted, bargained, and sold "unto the said party of the second part, his heirs and assigns forever," a lot of land in the township of South Amboy, being the premises in question, to have and to hold, "unto him the said party of the second part, his heirs and assigns, to the only proper use, benefit and behoof of him the said party of the second part, his heirs and assigns forever." Under this conveyance James Hardenbergh went into possession of the premises, built a house and made other improvements, and continued in possession until his decease. He died without issue. His wife, the lessor of the plaintiff, and one of the grantees in the deed, survived him, and continued in possession of the premises for six months after his decease, at which time the defendant, who is the father of James Hardenbergh, entered, and continued, by his tenant in possession at the commencement of this action [of ejectment].

The lessor of the plaintiff claims the whole premises under the above mentioned deed, and insists that she is entitled thereby to an estate in fee simple.

The counsel of the defendant, in the brief submitted to us, insists that the wife by force of the deed, "takes a joint estate with her husband for life, and then it goes over to his heirs in fee simple; a joint estate for life with remainder in fee to the husband," "a well known estate in the law;" and for example he refers to the 285th section of Littleton, which is in these words: "If lands be given to two, and to the heirs of one of them, this is a good jointure, and the one hath a freehold and the other a fee simple." To which Littleton adds, "If he which hath the fee dieth, he which hath the freehold shall have the entirety by survivor for term of his life." And Coke, in his com-

¹ Statement omitted. — Ed.

ment, says, "They are joint tenants for life, and the fee simple in one of them."

The counsel of the defendant farther insists that, "If the deed should be construed according to the claims of the plaintiff, still by force of our statute, Rev. Laws, 556, the lessor of the plaintiff and her husband were tenants in common."

It is manifestly unnecessary for us, in order to decide this cause, to enquire or determine whether the lessor of the plaintiff takes under the deed an estate for life, or an estate in fee simple, because if, as the defendant insists, she took only an estate for life, and by virtue of our statute, as a tenant in common, the plaintiff, her life estate of one moiety subsisting, must be entitled in this action to judgment, to recover one moiety of the premises.

Inasmuch, however, as the plaintiff demands the whole premises, although to ascertain the duration of an estate of the lessor is not essential, yet the operation and extent of the statute respecting joint tenants and tenants in common, must be examined, because thereon depends the question whether the plaintiff is to recover the entirety or only a moiety.

Properly to understand the statute and safely and truly to construe it, we must first distinctly comprehend the nature of the estate which passes to husband and wife by a grant made to them during coverture.

A conveyance of lands to a man and his wife, made after their inter-marriage, creates and vests in them an estate of a very peculiar nature, resulting from that intimate union, by which, as Blackstone says, "the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband." The estate, correctly speaking, is not what is known in the law by the name joint tenancy. The husband and wife are not joint tenants. I am aware that sometimes, and by high authority too, but *currente calamo* and improperly, as will, I think, be presently seen, the estate has been thus denominated. In respect, however, to the name only, not to the nature of the estate, is any diversity to be found. The latter has been viewed in the same light as far back as our books yield us the means of research. The very name, joint tenants, implies a plurality of persons. It cannot then aptly describe husband and wife, nor correctly apply to the estate vested in them, for in contemplation of law they are one person. Littleton, sec. 291, (665). Of an estate in joint tenancy, each of the owners has an undivided moiety or other proportional part of the whole premises, each a moiety, if there are only two owners, and if more than two, each his relative proportion. They take and hold by moieties or other proportional parts; in technical language, they are seized *per my et per tout*. Of husband and wife, both have not an undivided moiety, but the entirety. They take and hold not by moieties, but each the entirety. Each is not seized of an undivided moiety, but both are, and each is seized of the whole. They are seized not *per my et per tout*,

but solely and simply *per tout*. The same words of conveyance, which make two other persons joint tenants, will make husband and wife tenants of the entirety. Lit. sec. 665; 2 Lev. 107; Ambler, 649; Moor, 210; 2 Bl. Rep. 1214; 5 T. R. 564-8; Vezey, 199; 5 Jon. Ch. Rep. 437; 2 Kent Com. 112. In a grant by way of joint tenancy, to three persons, each takes one-third part. In a grant to an husband and wife, and a third person, the husband and wife take one-half, and the other person takes the other half; and if there be two other persons, the husband and wife take one-third, and each of the others one-third. Lit. sec. 291. In joint tenancy, either of the owners may at his pleasure, dispose of his share and convey it to a stranger, who will hold undivided, and in common with the other owner. Not so with husband and wife. Neither of them can separately or without the assent of the other, dispose of or convey away any part. It has even been held where the estate was granted to a man and his wife, and to the heirs of the body of the husband, that he could not during the life of the wife, dispose of the premises by a common recovery, so as to destroy the entail; nor did his surviving his wife give force or efficacy to the recovery. 3 Co. 5; Moor, 210; 9 Co. 140; 2 Vern. 120; Prec. Ch. 1; 2 Bl. Rep. 1214; Roper on husband and wife, 51. A severance of a joint tenancy may be made, and the estate thereby turned into a tenancy in common by any one of the joint owners at his will. Of the estate of husband and wife, there can be no severance. 3 Co. 5; 2 Bl. Rep. 1213. It has been held that a fine or common recovery by the husband during the marriage will work a severance, if the estate was granted to him and her before marriage, but if granted after marriage no severance will thereby be wrought. Ambler, 649. Joint tenants may make partition among them of their lands, after which each will hold in severalty. Of the estate of husband and wife, partition cannot be made. The treason of a husband does not destroy the estate of a wife. In an estate held in joint tenancy, the peculiar and distinguishing characteristic is the right of survivorship, whereby on the decease of one tenant, his companion becomes entitled to the whole estates. Between husband and wife the *jus accrescendi* does not exist. The surviving joint tenant takes something by way of accretion or addition to his interest, gains something he previously had not, the undivided moiety which belonged to the deceased. The survivor of husband and wife has no increase of estate or interest by the decease, having before the entirety, being previously seized of the whole. The survivor, it is true, enjoys the whole, but not because any new or farther estate or interest becomes vested, but because of the original conveyance, and of the same estate and same quantity of estate as at the time the conveyance was perfected. In the remarks I have made, it will have been observed, that the estates granted to husband and wife during marriage, has been the subject of examination. If lands be granted to a man and woman and their heirs, and afterwards they marry, they remain, as they previously were, joint tenants, they have moieties between them, as

they originally took by moieties they will continue to hold by moieties after the marriage, and the doctrine of alienation, severance, partition, and of the *jus accrescendi* may apply. Co. Lit. 187, b; 2 Lev. 107; Ambler, 649. And to this kind of estate Bacon may allude in the passage cited by the defendant's counsel. 3 Bac. abr. tit. Joint tenants B. "*Baron and feme* may be joint tenants;" or more probably, judging from the context, he means to lay down the doctrine that they may hold an estate in joint tenancy with another person; for unless used in one of these senses, the clause is unsupported by the authority cited in the margin, and differs from the succeeding passages on the same page.

Having brought to our view, the nature of the estate of husband and wife, we may proceed to ascertain the applicability of the statute respecting joint tenants and tenants in common to the case before us.

It is enacted "that no estate shall be considered and adjudged to be an estate in joint tenancy, except it be expressly set forth in the grant or devise creating such estate, that it is the intention of the parties to create an estate in joint tenancy and not an estate of tenancy in common." But we have seen that the deed of James Hardenbergh and wife would not, anterior to that statute, have created an estate in joint tenancy, that the estate created thereby would not have been considered or adjudged to be of that class. It follows, then, that it is not of that nature on which the statute was designed to operate. But the counsel of the defendant appeals very properly to the preamble and to the light which may be thence shed on the intention of the Legislature. It is in these words: "Whereas, estates granted or devised to a plurality of persons without any restrictive, exclusive, or explanatory words, have heretofore been held in this State, to be estates in joint tenancy, therefore be it enacted." The very same class of cases here, as in the enacting clause, is plainly designated. Such as had been held to be estates in joint tenancy. Moreover, the preamble mentions estates granted to a plurality of persons. But husband and wife, in contemplation of law, are one person, not a plurality. We shall be the more satisfied with this construction, if we recur to the causes which induced the Legislature to enact this law. The hardship, surprise, and unanticipated consequences of the doctrine of survivorship can rarely if, indeed, ever be felt in the case of husband and wife.

This statute, then, does not operate on the deed before us. It is subject to the principles of the common law; and by them, the wife is entitled, the husband being dead, to the possession of the whole premises.

In the case of *Shaw v. Hearsay*, 5 Mass. 521, the Supreme Court of Massachusetts held that the statute of that State did not extend to conveyances to husband and wife, a statute substantially like ours, with this difference indeed, that the words "conveyances and devises to two or more persons," are there actually contained in the enacting clause, as the counsel of the defendant proposed to read them in our

statute for greater elucidation. In New York, they have a similar statutory provision: and in the cases of *Jackson v. Stephens*, 16 John. 115, and *Jackson v. Cary*, *ibid.* 305, the Supreme Court decided that it did not extend to the case of husband and wife, and because their estate was not a joint tenancy. It is true, as remarked by the defendant's counsel, their statute has no such preamble. But hence, I apprehend their cases are entitled to more, not less, consideration. The preamble makes the scope of our statute more clear. In the State of Virginia, a similar decision has been made in the case of *Thornton v. Thornton*, reported in 3d Randolph, 179, although the words of the Virginia statute "of whatever kind the estates or thing, holden or possessed be," are much more favorable to such a construction as the counsel of the defendant has sought to establish for our statute.

Upon the whole, I am of opinion the plaintiff is entitled to recover the whole premises in controversy.

[The opinion of DRAKE, J., is omitted.]

SECTION VI.

Incapacity of Wife to Contract. Incapacity of Wife to Sue or Be Sued.

LOYD v. LEE.

4 George I. 1 Strange, 94.

AT *nisi prius* in London, coram PRATT, C. J., *de B. R.*

A married woman gives a promissory note as a *feme sole*; and after her husband's death, in consideration of forbearance, promises to pay it. And now in an action against her it was insisted, that though she being under coverture at the time of giving the note, it was voidable for that reason; yet by her subsequent promise, when she was of ability to make a promise, she had made herself liable, and the forbearance was a new consideration. But the C. J. held the contrary, and that the note was not barely voidable, but absolutely void; and forbearance, where originally there is no cause of action, is no consideration to raise an *assumpsit*. But he said it might be otherwise where the contract was but voidable. And so the plaintiff was called. *Vide* 1 Ven. 120, 159; Salk. 29; Yel. 50, 184; 2 Saund. 261; Hob. 18, 216; Pop. 152, 177; Lat. 21, 141.

LEE v. LANAHAN.

1871. 59 Maine, 479.

ON exceptions.

Assumpsit for money had and received. The writ was dated Aug. 13, 1870.

It appeared that on the 3d of September, 1863, the plaintiff deposited with his daughter, the defendant, who then was, and still is, a married woman, for safe keeping, the sum of one hundred dollars, and on 17th September, the further sum of twenty dollars; that on Aug. 12, 1870, having received none of the deposits, the plaintiff demanded the several sums of the defendant, who refused to deliver the same or any part thereof, whereupon this action was brought.

The presiding judge ruled that the action was not maintainable on the foregoing facts, and the plaintiff alleged exceptions.

W. P. Frye & J. B. Cotton, for the plaintiff.

When a bailee refuses to redeliver the subject of the bailment, he so far converts it, as to be liable in tort.

And it may be stated in general terms, that where one man wrongfully takes another's money or money's worth, the latter, although having a clear right to maintain an action as for a tort, may waive the tort and sue in assumpsit for money had and received. 2 Greenl. Ev. § 120; *Mason v. Waite*, 17 Mass. 560.

The basis of such an action is not of a contract between the parties, but legal obligation. 2 Greenl. Ev. § 118, and cases cited; *Hall v. Marston*, 17 Mass. 579; 2 Greenl. Ev. § 119; Metcalf on Cont. 5.

Suppose a minor embezzles money and refuses to restore it, a case entirely devoid of the elements of a contract; yet, notwithstanding his minority, it is held that the money may be recovered under a count for "money had and received." Oliver's Precedents, assumpsit.

Is there a legal obligation upon a married woman to restore money which she has no "right conscientiously to retain?"

[Remainder of argument omitted.]

M. T. Ludden, for defendant.

APPLETON, C. J. Where money is loaned to be repaid upon demand, the statute of limitations instantly attaches. *Ware v. Hewey*, 57 Maine, 391.

But where it is deposited for safe keeping, no action lies until after a demand. *Hosmer v. Clarke*, 2 Greenl. 308.

As more than six years elapsed between the deposit and the demand, it may be questionable whether the demand was made within a reasonable time, which would seem to be within the time required by the statute for bringing an action. *Codman v. Rogers*, 10 Pick. 112.

But however that may be, at the time of the deposit in 1863, no action was maintainable against a married woman, upon contracts entered into by her. *Fuller v. Bartlett*, 41 Maine, 241; *Ayer v. Warren*, 47 Maine, 217.

This is an action of assumpsit, and upon a contract express or implied. The contract to return the deposit was made when the money was deposited. The defendant was not then liable on her contracts. No contract has since been made. The Act of 1866, c. 52, providing that "the contracts of any married woman, made for any lawful purpose, shall be valid and binding," is prospective, and has no application to past contracts. If the wife is not liable upon her note of hand, she cannot be liable where there is no written promise. An oral promise of a married woman is not more binding than one in writing. *Bryant v. Merrill*, 55 Maine, 515. *Plaintiff's nonsuit.*

CUTTING, KENT, WALTON, DICKERSON, and DANFORTH, JJ., concurred
TAPLEY, J., dissented.

ROBINSON v. REYNOLDS.

1826. 1 *Aikens* (Vermont), 174.¹

THIS was an action [against Elisha Reynolds, and Sally, his wife] on book account; for articles delivered to the said Sally, previous to her inter-marriage with the said Elisha Reynolds.

Defendants pleaded: that, at the time of the delivery to Sally of the articles charged, viz., October, 1816, Sally was the wife of Joseph Emmerson.

Plaintiff replied: that in 1812 Emmerson departed from the United States and has ever since resided in Upper Canada; that in 1816 Sally lived in Vermont, separate from her husband; and was there doing business as a single woman and sole trader; and that plaintiff did not give credit to Emmerson, but dealt with Sally as a *feme sole* and on her sole credit.

Defendant rejoined: that Emmerson was born within the United States; and was, at the time of the delivery of the articles to Sally, a citizen of the United States; and had not abjured these United States, or been banished, exiled, transported or relegated therefrom.

The plaintiff surrejoined: that, before the delivery of the articles to Sally in 1816, viz., in 1812, Emmerson wilfully deserted Sally, and departed from the United States, leaving Sally wholly destitute of means of support; that Emmerson ever since hath, and still doth, reside in Upper Canada; and that he has not provided for Sally any means of subsistence.

Defendants demurred to the surrejoinder.

A. G. Whittemore, A. Aldis, and James Davis, for plaintiff.

B. Turner and B. F. Smalley, for defendants.

SKINNER, C. J. The facts disclosed by the pleadings in this case are, that the goods, to recover the value of which, this action was brought, were sold and delivered to, and upon the sole credit of, Sally Reynolds, one of the defendants, called the wife of Elisha Reynolds, the other defendant, previous to their marriage, viz., in October, 1816. That, at the time of the sale and delivery of the goods, she was the wife of one Joseph Emmerson, then living in Canada; which was known to the plaintiff. That Emmerson, a citizen born in the United States, left this State in 1812, and has ever since resided, and still resides in Canada, furnishing no support to his wife, who has, since the absence of her husband, transacted business, and contracted, as *feme sole*.

In contemplation of law, by marriage, the existence of the wife is merged in that of the husband. And it is a general principle, that she can, during coverture, make no contracts by which she is bound; or sue or be sued alone.

¹ Pleadings abridged. Arguments omitted. — ED.

To this rule of law, that a married woman is incapable of suing, or being sued, without her husband, there are excepted cases; and so far as the principles, which have controlled the decisions in such cases extend, the court feel bound to recognize them, as the law here.

Where the husband is accounted in law *civiliter mortuus*, the wife may sue or be sued alone; as where the husband is exiled, banished for life, or has abjured the realm. So too, where the husband is an alien, having never resided in the government, she is capable of suing and being sued alone. But we believe there is no principle of law, that will authorize her to sue, or subject her to a suit, as a *feme sole*, where the husband is a citizen or subject of the government, on account of her having a separate maintenance, or of his temporary absence.

That living separate and apart from her husband, with a separate maintenance, will not authorize the wife to sue, or subject her to be sued as a *feme sole*, is now well settled. *Marshall v. Rutton*, 8 T. C. 545.

In examining the cases that have been decided, bearing upon the question upon which a decision is called for in this case, it will be found, that although there are some, in which a temporary absence of a citizen or subject, would seem to have been a ground for considering the wife as a *feme sole*, for the purposes of contracting, pleading, and being impleaded; yet it is clearly opposed by the current of authority.

In the case of *Carrol v. Blencow*, 4 Esp. 27, decided at *nisi prius*, by Lord Alvanly, where the husband was transported for 7 years, and was still absent, the wife was held liable; notwithstanding the 7 years had expired at the time of pleading.

The case of *De Gaillon v. L'Aigle*, 1 Bos. & Pul. 357, in which the wife was held liable alone, is a case where the husband was a foreigner, and had never been in England. The case decided as above, viz., against the wife, by Lord Kenyon, at *nisi prius*, *Walford v. the Duchess of De Piennes*, 2 Esp. 554, is also a case, where the husband was an alien, though he had been domiciled in England. In the case of *Franks v. the same Duchess De Piennes*, the decision of the same judge is as in the former case.

These are the cases upon which the plaintiff principally relies; but from examination it will be found, none of them come up to this case; and if the principle contended for can be extracted from them, it is not supported by any ancient authority, and is very clearly and fully refuted by subsequent decisions.

In the case of *Carrol v. Blencow*, the ground taken is, that the husband had abjured the realm. The case of *De Gaillon v. L'Aigle* seems to have been decided much upon the authority of Lady Belknap's case; and that he was a foreigner. The case is clearly to be distinguished from Lady Belknap's; for, although it is said by Buller, J., that it does not appear whether the husband was banished for one year, for five, or for life; in Coke's Lit. 133, in treating of the ability of the wife to sue alone, the case is thus stated: "If, by act of Parliament,

the husband be attainted of treason or felony, and saving his life, is banished forever, as Belknap, &c., was, this is a civil death, and the wife may sue as a *feme sole*. But if the husband, by act of Parliament, have judgment to be exiled but for a time, which some call a relegation, this is not a civil death."

Justice Heath, who concurred in the opinion, in the case of *De Gaillon v. L'Aigle*, says, in the case of *Farrer v. the Countess Dowager of Granard*, 1 New Rep. 81, that the former case proceeded much upon the ground of the defendant's husband being a foreigner; and Lord Kenyon, in the case of *Franks v. the Duchess of De Pienne*, says, "had this been the case of an Englishman, who might be presumed to have the *animus revertendi*, it might be different."

In the case of *Marsh v. Hutchinson*, 2 Bos. & Pul. 224, Lord Eldon, in giving his opinion, limits the right of the wife of an Englishman to sue as a *feme sole*, and her liability to be sued as such, to the cases of the civil death of the husband; and in this opinion, Heath, justice, seems to concur; and on the subject of voluntary absence, says, "There is no case in which the wife has been held liable, the husband being an Englishman."

In the case of *Farrer v. the Countess Dowager of Granard*, 1 New Rep. 80, the wife was held not liable, upon the ground that a temporary absence of the husband was not sufficient. In the case of *Hopewell v. De Pinna*, 2 Camp. 113, before Lord Ellenborough, where the husband had been absent 12 years, at the time of pleading, and 11 years at the time of making the contract, the only question that was raised was, whether it was incumbent on the defendant to prove her husband to be living; and this having been proved, a verdict was taken for the defendant.

The decision in the case of *Kay v. the Duchess of De Pienne*, 3 Camp. 123, would seem to put this question at rest. The same Duchess De Pienne, against whom Lord Kenyon had twice decided at *nisi prius*, is again sued (her husband being still absent), — Lord Ellenborough remarks, "If the husband has never been in this kingdom, the wife of an alien, I think, may be sued as a *feme sole*;" and he supposes it probable, the fact that he had once been in England was not distinctly brought to Lord Kenyon's attention.

The principles of this decision are the same that governed the court in the case of *Marsh v. Hutchinson*; though Lord Ellenborough goes still farther, and denies the liability of the wife of an alien, who is absent, if he has once been domiciled in England; a distinction not taken in that case. The plaintiff was nonsuited, and at the ensuing term, the whole court concurred in the opinion of the chief justice, and refused a rule to show cause.

The same principle is fully confirmed in the case of *Boggett v. Frier*, 11 East, 301.

The court cannot listen to the suggestion, that the husband, by three years' absence, has lost all right to reclaim the wife without her con-

sent; nor will absence alone, for any length of time, deprive the husband of his legal rights, as such, over the wife. There is nothing in this case that shows the husband did not intend to return, at the time the plaintiff contracted with the wife; nor even now, excepting that the wife has taken another husband.

If the wife was not liable at the time of contracting, lapse of time cannot make her so. Suppose the husband should return while the action was pending, could the plaintiff proceed with his action and imprison the wife? In the event of the return of the husband, it will hardly be contended, that property acquired by the wife in his absence, would be beyond his control, or that she can be endowed. It is not perceived upon what principle the wife, for some purposes may be considered as a *feme sole*, and for others as *covert*.

Judgment, that the plaintiff's plea [surrejoinder?] is insufficient.

SECTION VII.

Incapacity of Wife to Convey or Devise.

CONCORD BANK v. BELLIS.

1852. 10 *Cushing* (Massachusetts), 276.

WRIT OF ENTRY. The whole case sufficiently appears in the opinion of the court.

J. S. Keyes, for the demandants.

B. F. Butler, for the tenants.

SHAW, C. J. The facts of this case are these: Nancy B. Hill, a married woman, now deceased, whose husband had been some time absent from the country, having children by a former marriage, some of whom are the tenants in this suit, in 1842, took of Amos Wheeler a conveyance of a lot of land in Waltham, in her own name, being the demanded premises, and at the same time gave back to Wheeler a mortgage in fee, to secure \$350. This mortgage was duly assigned to the demandants, who made entry thereon for condition broken. Another mortgage was afterwards made by said Nancy B. Hill, still being a married woman, to one Johnson, for \$700, which also came to the demandants by assignment. This does not seem to us to vary the question.

The question is whether the demandants, claiming under mortgages made by a married woman, whose husband has been and is a citizen, but who has temporarily deserted his wife, can maintain this action. We are not aware that it makes any difference that the tenants are the heirs at law of Nancy B. Hill. We suppose it will not be contended that the conveyance of the estate to a married woman, absolutely and without condition, vested the estate in her; *i. e.*, constituted a joint seisin to husband and wife in her right during the coverture, and then to the use of the wife. But if it could be contended that the conveyance and reconveyance were dependent acts, constituting one transaction, so that if one was void, both were void, this would not aid the demandants; the result would be that nothing passed by the deed to Mrs. Hill, and the fee remains in Wheeler and his heirs. The demandants must recover, if at all, upon the strength of their own title, whether the tenants can hold as heirs of Nancy B. Hill, or not.

It is among the familiar principles of the common law that a married woman is legally incapable of conveying her estate by deed, and that her deed is void. Co. Lit. 42 *b*, & *n* 4. Her deeds are regarded not merely as voidable, but absolutely void both at law and in equity. Cruise Dig. tit. Deed, c. 2, § 24. So it is held in this Commonwealth that the separate deed of a married woman is *ipso facto* void, and all the covenants contained in it. It is not voidable merely, but abso-

lutely void. *Fowler v. Shearer*, 7 Mass. 14. But this distinction between void and voidable, a characteristic which to some extent distinguishes the deed of a minor, which he may affirm after coming of age, and that of a married woman which is incapable of ratification even after the removal of the disability, can have no influence in the present case. It does not appear that the disability of the grantor ceased during her life, nor is there any suggestion of any ratification subsequent to the original mortgages.

The consideration which struck us at first as plausible, was the apparent want of equity, where a deed is executed conveying a title, and a deed is executed and delivered back by the grantee to the grantor, creating but a momentary seisin in the grantee, that the one should be held valid and the other void. But as suggested before, if one were held to avoid the other, it would not help the demandants. It would leave the title in the original grantor, unaffected by the deeds. But there are other considerations growing out of the nature of the subject. A good conveyance may be made by deed poll to an infant, lunatic, or *feme covert*, although such grantee would be under legal disability to make a conveyance. It is true that in theory of law, the grantee in a deed poll is held to be a party by accepting the deed. But the deed does not derive its efficacy as a grant and conveyance from the act of the grantee in accepting, but from that of the grantor in executing it. In case of a plain absolute conveyance, without conditions, either no special acceptance is necessary to give it effect, or what is nearly the same thing, the acceptance of the grantee will be presumed. So the delivery of the deed to a third person unconditionally, for the use of the grantee, gives effect to the deed. From these considerations it seems to follow that the efficacy of a deed to transfer real estate by deed poll, does not depend upon the legal capacity of the grantee to transfer an estate by deed.

Supposing the estate to be well vested by Wheeler's deed in the grantee, a married woman, the question recurs whether he can derive title from her deed to him. It is said that the deeds being made at the same time, are to be deemed to relate to each other and to constitute one transaction. We think it is so, and that they should be construed together. But what is that one transaction? An absolute conveyance in fee to the grantee, and a reconveyance void in law, made by one having no legal authority to contract. It is the ordinary case of a man who enters into a contract with one who has no legal authority to make such contract. This case is not even accompanied by the alleged, though always vain apology, that the grantee did not know the fact which constitutes the grantor's disability. He did know that she was a married woman, though in our judgment that knowledge could make no difference in regard to his rights.

As the demandants can make title only through the void deed of a married woman, which in law could convey no title, according to the report and the agreement of the parties, there must be

Judgment for the tenants.

MANCHESTER v. HOUGH.

1828. 5 *Mason* (U. S. Circuit Court), 67.

EJECTMENT for certain lands in Providence. Plea, the general issue. The town of Providence, under whom the defendants claimed, took upon themselves the defence.

The facts, as they appeared at the trial, were as follows: On the 30th of September, 1797, Isaac Manchester (since deceased) and Mary Manchester, his wife (the present plaintiff), were seized in fee simple, in her right, of the demanded premises. On the same day, they conveyed, by their deed of that date, to Samuel Nightingale, the treasurer of the town of Providence, for the use of the town, one portion of the lands in controversy, to hold to him and his successors in the office forever. This deed was on the same day acknowledged by the grantors to be their voluntary deed, before G. T., a justice of peace of the same town. On the 4th of May, 1799, the said Isaac and Mary made a conveyance by deed of that date, of the residue of the demanded premises to the same treasurer, in like manner for the use of the town of Providence; which deed was acknowledged in the same manner. At the time of executing the first deed, there was no statute in Rhode Island authorizing a *feme covert* to convey her lands by deed, joining her husband therein.

The question was, whether the deed of 1797 operated as a legal conveyance of the wife's estate. The acknowledgment of the deed of 1799 was admitted not to be according to the provisions of the statute of Rhode Island of 1798 on this subject.

The cause was argued by *Richmond* and *Crapo*, for the plaintiff, and by *Bridgham* and *Searle*, for the defendants.

STORY, J. This case depends upon the validity of the conveyances made of the wife's estate by herself and her late husband by the deeds of 1797 and 1799. It is admitted, that the latter deed cannot bind the wife according to the statute of Rhode Island of 1798, § 7 (Digest of 1798, p. 267), because she has not been examined *privily* and *apart* from her husband, and made an acknowledgment, that the deed was her voluntary act, and that she did not wish to retract the same, before the magistrate taking the acknowledgment. Without a compliance with these requisites, the statute declares, that the deed shall not operate to convey any greater estate in the premises, than what belongs to the husband.

The validity of the other conveyance in 1797 turns upon the question, whether, by the common or customary law of Rhode Island, a *feme covert* can convey her real estate by deed, her husband joining in the deed. It is not denied, that this was in Rhode Island the usual mode of conveying her estate antecedently to the statute of 1798; and that it had prevailed without objection and without question for a great

length of time; and that this is the first time, in which it has been judicially brought into controversy. Conveyances by fine or common recovery of the estates of *femes covert* may have sometimes been resorted to by very cautious persons; but the general practice in Rhode Island has been, as I have stated. Many titles have passed, and many titles are now held exclusively under such conveyances. And to shake their validity would at this period be productive of incalculable mischiefs. If there ever was a case, in which the doctrine might be fairly applied, that *communis error facit jus*, the present is that case. In truth, from an early period in the history of New England, the right of a *feme covert* to convey her real estate by deed with the assent of her husband was recognized, and has been constantly enforced by courts of law. It now constitutes a part of the common law of New England.¹ It probably originated in the necessities of the country at an early period of its settlement, when fines and recoveries were little known; or if known, courts were rarely held, and understood little of the proper mode of proceeding. The same necessity has produced a similar result in other parts of the Union.² The Act of 1798 can be justly considered in no other light, than as a legislative sanction and recognition of the right and the practice. My opinion accordingly is, that the deed of 1797 is sufficient to pass the estate of the *feme covert* to the premises described therein.

Verdict accordingly.

MARSTON v. NORTON.

1830. 5 *New Hampshire*, 205.

THIS was an appeal from a decree of the judge of probate in this county, made on the 11th June, 1828, allowing and approving, in solemn form, a certain instrument, as the last will and testament of Esther Norton. It was agreed by the parties, that the said instrument, which purported to contain a devise by the said Esther of all her real estate to W. Norton, her husband, for life, and after the decease of her husband, to John Norton, in fee, and to appoint John Norton executor, was duly made, executed, witnessed, and published by the said Esther, as her last will and testament; that at the time of making and publishing the same, the said Esther was of sound mind, and was the wife of the said W. Norton; and at the time the said instrument was executed, and in presence of the same witnesses, the said W. Norton made, signed, and sealed a memorandum, under the said instrument, as follows:—

“I, the said William Norton, husband of the said Esther Norton, do

¹ See *Fowler v. Shearer*, 7 Mass. R. 14; *Dudley v. Sumner*, 5 Mass. R. 463; *Colcord v. Swan*, 7 Mass. R. 291.

² See *Lessee of Lloyd v. Taylor*, 1 Dall. R. 17; *Davy v. Turner*, 1 Dall. 11.

consent and agree, that my wife, Esther Norton, should dispose of her real estate according to the above will."

Thomas Marston, the appellant, is one of the heirs at law of the said Esther. The reason assigned for this appeal was, that the said Esther was, at the time of executing and publishing said instrument, a *feme covert*; and the question was, whether the decree must be reversed for that cause?

Tilton, for appellant.

[Argument omitted.]

Mason, Jr., for appellee.

[After stating the early common law, and the civil law; and quoting the Statute of Wills, 32 Henry VIII.]

A *feme covert* is clearly included in the words of this statute.

By a constitution of Archbishop Stafford, it is ordained, that, "Whereas divers persons do hinder, or endeavor to hinder, the free making and execution of the testaments of women, either sole or married, we decree that none henceforth shall do the same." 4 Burns' Eccl. Law, 47.

Two years after the making of this constitution, we find a petition of the commons in Parliament, that whereas there was a constitution made by the prelates, that women married might make a will, it might be ordained that the people should remain in the same state as they had been accustomed to be, in the time of the king's progenitors. 4 Burns, 47.

And by the statute of 34 Henry VIII., it is enacted, that wills or testaments made of any manors, lands, tenements, or hereditaments, by any woman covert, shall not be taken to be good or effectual in law. It would seem, then, that a *feme covert* was not disabled from devising by the statute of wills.

Are they disabled by our statute, which is in these words? "Every person lawfully seized and possessed of any real estate in this State, of the age of twenty-one years and upwards, and of sane mind, shall have power to give, devise, and dispose of the same, by a will in writing."

This statute contains certain limitations and exceptions, but it does not except a *feme covert*. It ought, therefore, to be construed to give them the power.

The universal practice in this State, so long recognized by our courts, by which a *feme covert* may join with her husband in a conveyance of her land by deed, would seem to indicate plainly the sense of the Legislature in omitting the disabling clause of the statute of Henry VIII., to give to married women this power of devising.

The popular understanding of the intent of the statute, is also shown by the fact, that wills of married women devising real estate, are found upon the files of the Probate Courts.

The will, in this case, was drawn and witnessed by one judge of probate, and allowed by another.

Do any reasons of policy apply, why a *feme covert* should not possess this power?

If it be reasonable that she should have power to convey her lands by joining with her husband in a deed, it seems to be equally reasonable that she should have power, with his consent, to devise them. A devise has the advantage that it is revocable.

[Remainder of argument omitted.]

RICHARDSON, C. J. The question in this case is, whether a married woman can, with the consent of her husband, dispose of her real estate by a will?

In ancient times, no lands or tenements were, by the common law of England, devisable by the last will of any person, except in particular places, by custom. Coke Litt. 111, *b*, and note 1; Litt. § 167; Wright's Tenures, 171-173; 6 Coke, 17, *Wild's Case*; Cowper, 305.

And by the common law as it was understood in the reign of Henry the Second, a man's goods were not wholly at his own disposal by will, but his wife and children had an interest in them, of which he could not deprive them by a will. The shares of the wife and children were called their "*rationabilis pars*," and the writ *de rationabili parte bonorum* was given to enforce the claim. 2 Bl. Com. 491; Fitz H. N. B. 284; Coke Litt. 176, *b*.

It seems to have been settled in very ancient times, that a married woman might, with the assent of her husband, dispose of her chattels by will. Bracton, 60; Moore, 339, *Finch v. Finch*; Cro. Car. 106, *Johns v. Rowe*; Lovell, 143-146.

But by the common law, a *feme covert* never could make a valid devise of land with or without her husband's consent, to any person whatever. Godol. 301; Shep. T. 402; Com. Dig. "Devise" II. 3; Lovell, 96; 3 Johns. C. Rep. 523, *Bradish v. Gibbs*; 4 Mason, 443, *Picquet v. Swan*.

She was considered to be so entirely under the power of the husband that she could, in no case, make what in propriety of speech is called a will. 4 Burns Eccl. Laws, 49; Powell on Devises, 97.

By the statute of 32 Henry VIII. ch. 1, it was enacted, "that all and every person and persons, having a sole estate or interest in fee simple, or seized in fee simple, in coparcenary, or in common of any manors, lands, &c., shall have power to give, dispose, will, and devise by will, in writing or otherwise, by act executed in his lifetime all his said manors," &c.

The language of this statute was broad enough to include all persons. But it seems to have been thought by the courts of the common law that, upon the construction of statutes, not the mere letter but the internal meaning and sense of the Legislature was to be considered, and although the statute gave power to every person having land to devise it, yet it was thought that it could not have been the intention of the makers of the statute, that persons who were disabled by the common law to dispose of their lands by other consequences, should have the

power to devise it; therefore, in expounding that statute, a married woman was considered as not comprehended under these general words. Powell on Devises, 93-95.

And as soon as an attempt was made in the ecclesiastical courts to establish the wills of married women, it was enacted by Parliament, that wills of lands by married women should not be taken to be good in law. 4 Burns, 46.

In Massachusetts, by a statute passed in 1692, it was enacted, "That every person lawfully seized of any lands, &c., in his own proper right in fee simple shall have power to give, dispose, and devise, as well by his last will and testament in writing, as otherwise by any act executed in his life, all such lands," &c. Prov. and Col. Laws, 230. And the statute of 1783, cap. 24, contains a provision substantially in the same language. In the case of *Osgood v. Breed*, [12 Mass. 525,] to which we have been referred by counsel, it was decided, by the Supreme Court of Massachusetts that married women have not power under their statute to make a will of lands, even with the consent of their husbands.

Our provincial act of the 4 Geo. I., cap. 73, was copied verbatim, from the said statute of Massachusetts passed in 1692. Prov. Laws, 104.

The statute of February 3, 1789, enacted "That every person lawfully seized and possessed of any estate in lands, &c., of the age of twenty-one years and upwards, and of sane mind, shall have power to give, devise, and dispose of the same, as well by his last will and testament in writing, as by any other act duly executed," &c.

The statute of July 2, 1822, contains a provision on this subject, substantially the same as the said provision in the statute of February 3, 1789.

It thus appears, that the provisions on this subject in the statutes of England and of Massachusetts are almost precisely the same as in our statutes, and we are of opinion, that the construction upon these provisions in relation to married women in England and Massachusetts are entirely correct. A married woman is not, by the common law, *sui juris*, but is *sub potestate viri*.

She is under a civil disqualification arising from want of free agency, and not from want of judgment, and it seems to us to be wholly incredible, that the Legislature should have intended to give to a married woman the power of devising her lands, at her decease, while the power of disposing of them at her will is denied to her during her life. Her will of chattels may be made valid by the assent of her husband, because the gift is, in effect, his gift, and the property passes from him. But with respect to her real estate the case is different. Her lands at her decease go not to him, but to her heirs, and his assent to her will of real estate can give it no validity.

Decree of the court below reversed.

SECTION VIII.

Estoppel of Married Women.

SAVAGE v. FOSTER.

9 George I. 9 Modern, 35.

MARGARET SMITH being seised of the lands in question, upon her marriage with Peter Flavill settled the same upon trustees and their heirs, to the use of the said Peter Flavill for life, then upon Margaret his intended wife for life; remainder, after the death of the said Peter and Margaret, to the heirs of the said Peter, on the body of the said Margaret to be begotten; remainder to the right heirs of the said Margaret forever. The said Peter and Margaret had issue only one daughter, the now defendant, who was married to one Foster. Peter Flavill died, and then his widow married one Brown, by whom she had issue one other daughter, and no more; which daughter being courted by one Williams, but he refusing to marry her without such a fortune, which Margaret her mother was not able to give without breaking through this settlement, conveyed the said lands to the aforesaid Williams, &c.; and the defendant Mrs. Foster, and her husband, who knew that the lands were settled on her in tail as aforesaid, solicited her mother Margaret Brown to make a conveyance in favor of the said Williams, and were assisting in carrying on the marriage between him and her half-sister Brown. Whereupon the said Margaret conveyed these lands, &c. to the use of herself for life, remainder to Williams and his heirs; then the marriage took effect; and afterwards Williams sold these lands to the plaintiff Savage, who entered and built an house thereon.

And now Mrs. Foster, who was the issue in tail by virtue of the said settlement, and endeavoring to set it up against the title of the plaintiff, who was the purchaser, he exhibited a bill against her to have his title established against that settlement; for that she having full notice of the purchase, and of her own title, she gave no notice thereof to the plaintiff, and therefore ought not to be at liberty now to impeach it, though she was a *feme covert*, but that she should be concluded by this fact as well as if she was an infant. ♡

It was argued for the defendant Mrs. Foster, that two things are necessary to bind the right in cases of this nature: the one is, that the party must know his own title to the lands; and the other is, that he must be instrumental in promoting the purchase thereof by the vendee, without giving him notice of such title; for it would be of dangerous consequence if the bare permission of him to proceed in the purchase

should be a foundation to bind his right in this court on the foot of fraud. It is true, the defendant knew she had a title under this settlement, but she apprehended she was not to take till after her mother's death; she knew likewise that her sister was about to marry with Williams, but did not know upon what terms; but if she had known the terms of that marriage, she was then a *feme covert*, and her husband ought to have given the plaintiff notice of her title; therefore his negligence shall not prejudice her, who had done nothing to lose her inheritance and the entire benefit of this settlement for ever.

On the other side it was first denied that the two things before-mentioned by the plaintiff's counsel are necessary to have relief in cases of this nature; the one, that the party should know his own title; and the other, that he should be instrumental in carrying on the purchase by another, without giving him notice of such title. It is true, he ought to know his own title, and that must necessarily be intended in this case, because the defendant had the custody of this deed of settlement; but it is not necessary that the person interested should be active or instrumental in carrying on the agreement in order to a purchase; for if the party knew his own title, there can be no danger that his right should be bound by the purchase, because it was in his power to help himself, by giving the purchaser notice of such right; and though this defendant was a *feme covert*, yet it was a fraud in her not to give the purchaser notice of her right; and therefore it shall be bound for ever; and the rather, because the defendant solicited her mother to make this conveyance in favor of Williams, upon the marriage of her sister, and for that the plaintiff hath entered and built on the lands.

The Court: Where there is a parol agreement made for a lease, and the lessee, by virtue of such agreement, enters and builds, this court will establish it on the foot of fraud in the lessor, notwithstanding the statute of frauds, &c.; because contracts executed in part are not always within the statute, though executory contracts are.

Now this bill is brought to be relieved against a fraud in the defendant, who would avoid the plaintiff's title by an elder settlement, though she was privy to, and assisting in, carrying on the marriage of him under whom the plaintiff claims, and never gave any notice of her title to the purchaser.

Now when anything in order to a purchase is publicly transacted, and a third person knowing thereof, and of his own right to the lands intended to be purchased, and doth not give the purchaser notice of such right, he shall never afterwards be admitted to set up such right to avoid the purchase; for it was an apparent fraud in him not to give notice of his title to the intended purchaser, and in such case infancy or coverture shall be no excuse; for though the law prescribes formal conveyances and assurances for the sales and contracts of infants and *feme coverts*, which every person who contracts with them is presumed to know; and if they do not take such conveyances as are necessary, they are to be blamed for their own carelessness, when they act with

their eyes open ; yet when their right is secret, and not known to the purchaser, but to themselves, or to such others who will not give the purchaser notice of such right, so that there is no laches in him, this court will relieve against that right, if the person interested will not give the purchaser notice of it, knowing he is about to make the purchase ; neither is it necessary, that such *infant* or *feme covert* should be active in promoting the purchase, if it appears, that they were so privy to it that it could not be done without their knowledge.

Therefore it was decreed, that the defendant should levy a fine to the plaintiff to extinguish her right to the lands in this settlement, and that the plaintiff should have a perpetual injunction to quiet his possession ; and that if the defendant shall levy the fine quietly, and without delay, then the plaintiff shall have no costs, otherwise he shall pay costs. And the case of *Watts v. Cresswell*, 9 Viner Abr. 415, was now remembered, where tenant for life borrowed money, and his son, who was the next in remainder, and an infant, was a witness to the deed of mortgage ; this court gave relief on the foot of fraud, because the infant did not give the mortgagee notice of his title. So in the case of one Clere, who was an infant, and clerk to an attorney, and had a mortgage on his master's estate, and engrossed a subsequent mortgage thereof to another, without giving notice that the estate was mortgaged before to him ; and for that reason his mortgage was postponed on the foot of fraud.

Nota. — In the next sessions of Parliament, the defendant petitioned to appeal, or to have a rehearing at the peril of costs, and offered to levy a fine on that condition ; but it was rejected for not coming in time.

LOWELL v. DANIELS.

1854. 2 Gray (*Massachusetts*), 161.¹

WRIT OF ENTRY. Plea, *nul disseisin*. Trial in the Court of Common Pleas, before HOAR, J.

Demandant claimed under two mortgages from Hooton, one executed in 1836 and the other in 1837. Hooton claimed under a deed from Rachel Smith, dated Aug. 1, 1834.

Rachel Smith, then a widow, was the owner of the premises in 1834. She married one Heffrein in February, 1835, and died in June, 1839 ; leaving her husband living, but no children by this marriage. Heffrein, with his wife, was in possession of the premises for a year or more after their marriage. In January, 1839, Heffrein deeded his interest in the premises to the tenant. The tenant's wife was daughter of said Rachel by a former marriage.

The deed under which Hooton claimed was a warranty deed, signed

¹ Statement abridged. Arguments omitted. — ED.

"Rachel Smith," dated Aug. 1, 1834, acknowledged and recorded Dec. 31, 1835. This deed was in fact executed about Dec. 31, 1835.

There was some evidence tending to show, as the demandant contended, that said Rachel made this deed with the intention of preventing her husband Heffrein from holding any title to the premises; and that it was antedated, and signed and executed in the name which she bore before her marriage, for that purpose; and that it was made without his knowledge.

An agent and son of the demandant, who had charge of the matter, testified that when Hooton applied for the loan on the first mortgage, he caused the record title to be examined, and also asked Hooton for the original deeds of the property, who referred him to said Rachel; that he called upon her, and told her that he wished to examine Hooton's title; that she then produced the deeds under which she acquired title; that she knew that the application was for the purpose of taking a mortgage, or doing something about a mortgage; but that nothing was said directly about Hooton's title to the land, except as connected with her title, and those deeds were to assist in investigating his title; and that she communicated no defect in the title to the witness, who at that time had not heard of her marriage to Heffrein.

Upon these facts, the tenant asked the judge to instruct the jury, that the deed of Rachel Smith to John B. Hooton, being made by a married woman, without the concurrent action of her husband, or his joining in the same in any way, but made by her in the name which she bore while unmarried, and acknowledged by the same name, and delivered while she continued under coverture, was altogether void, and in no way effective to give the grantee named therein a valid title, or any title, and that consequently the mortgages made by him created no lien upon the estate, and the demandant could not recover.

But the judge declined to give the instruction requested by the tenant, and instructed the jury "that if Mrs. Heffrein made and executed the deed after her marriage; and it was antedated and signed by her, using the name which she bore before her marriage to Heffrein, with a fraudulent purpose, in which she concurred and participated, of giving the deed an effect which it would not have had in her true name and under the true date, knowing that it would deceive and impose upon some person to be affected by it; she and her heirs would be estopped to deny that the date of the deed which she thus executed and caused to be recorded was the true date; and against them the deed would be taken to have the same effect as if it had been executed and delivered at the time of its date, when she was unmarried and had capacity to make it; and this would be so whether the fraudulent purpose was to deprive her husband of his interest in the estate, or any other; or perhaps a better way of stating it would be, that in the case supposed the respondent would be estopped from setting up any title in Mrs. Heffrein at the time Hooton conveyed to the demandant. But mere passive conduct on her part, in suffering the demandant without notice to take

a defective conveyance, or signing the deed by a wrong name with a wrong date, without a fraudulent purpose on her part, would not estop her heirs to deny the validity of the deed."

The jury returned a verdict for the demandant, and the tenant alleged exceptions.

J. Parker & H. M. Parker, for tenant.

A. H. Nelson & J. P. Converse, for demandant.

THOMAS, J. The decision of one of the questions raised by the bill of exceptions seems to be conclusive of the rights of the parties, and to this we have confined our attention. That question is, whether the tenant, whose wife is heir at law of Mrs. Heffrein, is estopped to deny the validity of the deed under which, through the deeds of Hooton, the demandant claims.

The deed of Mrs. Heffrein to Hooton, *proprio vigore*, conveyed no estate. The separate deed of a married woman, without the assent of the husband, it was absolutely void. *Fowler v. Shearer*, 7 Mass. 21; *Concord Bank v. Bellis*, 10 Cush. 276. It has no force, because the grantor had no capacity to make it. The instrument has the form and semblance of a deed, and nothing more. Indeed, the demandant does not contend that this deed has of itself any validity; but that, under the facts of the case, the tenant is estopped to deny its validity; or, in other words, the title of the demandant is the result of estoppel, and not of grant; or to speak perhaps more precisely, of an estoppel that works a grant.

The demandant, to show title in himself, offers the two deeds of mortgage from John B. Hooton. Deeds of warranty, they make *prima facie* evidence of the seizin of the premises in the demandant. The tenant then shows that the premises belonged to Mrs. Smith; that she died intestate; that his wife was her daughter and heir in law. The tenant thus makes an elder title. The demandant must now show that the estate that was in Mrs. Smith passed out of her and into his grantor. He undertakes to show it passed by deed. To do this, he must prove not merely the execution of the instrument, but its execution by one having the requisite legal capacity to make a deed. He offers for this purpose a copy from the registry, of a deed, purporting to be from Mrs. Smith to his grantor, bearing date August 1st, 1834. Assume that this is sufficient *prima facie* evidence of the execution and delivery of the deed at the time of its date; it is only *prima facie*, and when the evidence is closed, the burden is still on the demandant to show its execution and delivery, by one competent in law for that purpose. When the evidence is in, it appears that this deed was made, delivered, acknowledged, and recorded, when the grantor was a married woman, and incapable of making it; that is, that it was absolutely void. By force of the deed, then, the demandant wholly fails to show that the land had passed from the tenant's wife's mother to his grantor.

Then the demandant says that the deed, upon its face, bears date of the first of August, 1834, when the grantor was sole and capable of

making a deed; that it was signed with the name she bore before her marriage with Heffrein; and was so signed and dated with a fraudulent purpose, on her part, of giving the deed an effect, which it would not have had in her true name, and under the true date; knowing it would deceive and impose upon some person to be affected by it; and when the agent of the demandant called upon Mrs. Heffrein, stating to her that he wished to examine Hooton's title, and informing her that the application was made with a view to a mortgage, she produced the deeds of the land to herself, but did not communicate to the agent any defect in Hooton's title; and that therefore, whether the fraudulent purpose was to deprive her husband of his interest in the estate, or any other, the grantor and her heirs are estopped to deny that the date of the deed, which she executed and caused to be recorded, was the true date; and as against her and her heirs, the deed will be taken to be of the same effect as if it had been executed and delivered at the time of its date, when she was unmarried and had capacity to execute it; or in other words, the tenant is, upon these facts, estopped from setting up any title in Mrs. Heffrein at the time Hooton conveyed to the demandant. This we understand to be the view of the case taken by the learned judge, though perhaps in a critical examination of the language used by him, the silence of the grantor as to the defect of Hooton's title will not be found to be included as an element in the instruction given to the jury.

This raises the material question at issue between the parties, whether a married woman and her heirs may be barred of her estate by an estoppel *in pais*.

She can make no valid contract in relation to her estate. Her separate deed of it is absolutely void; any covenants in such separate deed would be likewise void. If she were to covenant that she was sole, was seized in her own right, and had full power to convey, such covenants would avail the grantee nothing. She could neither be sued upon them, nor estopped by them. The law has rendered her incapable of such contract, and she finds in her incapacity her protection; her safety in her weakness. Her most solemn acts, done in good faith, and for full consideration, cannot affect her interest in the estate, or that of the husband and children. The strongest possible example of this was presented in the case of the *Concord Bank v. Bellis*, above cited, in which it was held that where an estate was conveyed to a married woman, and she at the same time gave back a deed of mortgage to secure a part of the purchase money, such deed of mortgage was wholly void. And we think a married woman cannot do indirectly what she cannot do directly; cannot do by acts *in pais* what she cannot do by deed; cannot do wrongfully what she cannot do rightfully. She cannot by her own act enlarge her legal capacity to convey an estate.

This doctrine of estoppel *in pais* would seem to be stated broadly enough, when it is said that such estoppel is as effectual as the deed of the party. To say that one may, by acts in the country, by admission,

by concealment or by silence, in effect do what could not be done by deed, would be practically to dispense with all the limitations the law has imposed upon the capacity of infants or married women to alienate their estates.

But if Mrs. Heffrein were personally estopped to say this deed was executed by her while under coverture, we are not prepared to say that the daughter would be so estopped. The condition of the estate was this : The fee was in Mrs. Heffrein, with limited power of alienation ; with no power indeed to convey, except by the joint deed of herself and husband ; Rev. Sts. c. 59, § 2 ; and with no power to devise it. The law had given her no power by any act of hers to change the destination of the estate, or impair the title which at her decease would vest in her child. Upon her decease, the daughter enters into possession of the estate. She is rightfully there ; the estate is in her, unless there has been an alienation of the estate in the mode prescribed by law, in the lifetime of the mother. If it be said that the mother was guilty of misrepresentation and concealment, for which coverture affords no protection ; the answer might well be, that whatever might be the effect upon her personally, even if it estopped her to claim any interest in the estate, it could not do what the statute has not done, give her a power so to alienate the estate as to prevent the entry of her heirs at law upon her decease.

Such seems to us the result of the application of well settled principles of law to the case at bar. And upon a somewhat diligent examination of the authorities, we have found none to lead us to a different conclusion. The diligence of the counsel for the demandant has cited but two cases, having much tendency even to sustain the position that the estate of a married woman, incapable of making a deed, may pass by estoppel *in pais*. These are *Hunsden v. Cheyney*, 2 Vern. 150, and *Savage v. Foster*, 9 Mod. 35.

In both these cases the husband and wife, who jointly were capable of levying a fine, were parties to the original frauds. They were both suits in equity against the parties to the fraud. They both rely, as matter of authority, upon the case of the estoppels of infants, who are not incapable of conveying, but whose deeds are voidable only and not void ; and neither of the cases is, we think, entitled to the highest consideration. If they established the point, for which they are cited, that the estate of a married woman may pass by her acts *in pais*, not only without the concurrence of the husband, but in fraud of his rights, we should question their application under our system, where the statute of frauds is equally binding in courts of equity as of law ; where the powers of married women, in the conveyance or devise of lands, are defined and limited by express statute ; and where the titles to real estate are matters of public record.

No case at law has been cited, nor have we found one, in which it has been held that the estate of a party has been barred by estoppel *in pais*, who was incapable of conveying by deed. And though courts of law

have liberally applied the doctrine of estoppel *in pais* to cases of personal property, in the transfer of which no technical formalities intervene to prevent its application, we know of no case in which it has been applied to a party incapable in law of making a contract.

The result of the views we have felt compelled to take of the case is, that the deed of Mrs. Heffrein to the demandant's grantor was absolutely void, and that this tenant is not estopped to deny its validity.

New trial in this court.

SECTION IX.

Contracts and Conveyances between Husband and Wife.

BASSETT v. BASSETT.

1873. 112 *Massachusetts*, 99.

CONTRACT, with a count in tort. The first count was on a promissory note dated May 1, 1869, for \$620; payable to the plaintiff in three equal instalments on November 1, 1869, May 1, 1870, and November 1, 1870; signed by the defendant and one Henry C. Goodrich, of California. The second count was for \$620, money had and received by the defendant on or about May 1, 1869, to the plaintiff's use, with interest. The third count was in tort, being trover for \$620 of the plaintiff's money alleged to have been converted by the defendant to his own use prior to the date of the writ. The same money was sought to be recovered in each count. The defendant in his answer denied each and every allegation in the declaration, and alleged that the plaintiff, before the defendant received the money, was, and ever since had been, his wife.

Trial in the Superior Court, without a jury, before WILKINSON, J., who, upon the following facts, found for the defendant, and reported the case for the consideration of this court.

The plaintiff was married to the defendant May 3, 1866. The money claimed in this suit was hers before marriage, being the earnings of her personal labor. After marriage, at the request of her husband, she let him have at different times sums of money amounting in the whole to \$620, on his oral promises to return it to her. On May 1, 1869, she received the note described in the first count. The parties had not lived together since May 1, 1869, but still sustained the relation of husband and wife. The plaintiff, through a third person, demanded the money of the defendant several times shortly prior to the date of the writ. He, from alleged inability, declined to let her have it.

The case was submitted upon briefs.

J. S. Abbott, for the plaintiff.

M. F. Dickinson, Jr., for the defendant.

GRAY, J. The defendant is not liable upon either of the counts in contract, because no contract between husband and wife for the payment of money has any validity at law. *Ingham v. White*, 4 Allen, 412; *Gay v. Kingsley*, 11 Allen, 345; *Chapman v. Kellogg*, 102 Mass. 246.

Nor can he be charged upon the count in tort in the nature of trover, because the money sued for was voluntarily paid to him by the plaintiff, and the mere refusal to perform his promise to return an equal

sum to her does not constitute a conversion of the money so received by him.

These reasons being decisive of the case, it is unnecessary to consider the difficulties in the way of allowing a wife to maintain any action whatever against her husband. See *Lord v. Parker*, 3 Allen, 127, 130.
Judgment for the defendant.

FIREBRASS, ON THE DEMISE OF JANE SYMES, WIDOW, v.
 PENNANT.

1764. 2 *Wilson*, 254.

EJECTMENT of lands in the county of Somerset, tried at the Assizes 1 April, 1763, verdict for the plaintiff subject to the opinion of the court upon this case; which states, that the premises in question are parcel of the manor of the rectory of Compton Martin in the county of Somerset, and have been held by copy of court roll of that manor time out of mind, of which manor the rector of the same rectory for the time being is the Lord.

That the Reverend William Symes, clerk, on the 20th of February, 1726, was rector of the said rectory, and lord of the manor of the same rectory; that the premises in question, being in the hands of the said William Symes the lord upon the death of the last tenant thereof, as rector of the said rectory, and lord of the manor, did on the 20th of February, 1726, demise the premises in question to the lessor of the plaintiff Jane Symes, by copy of court roll; to hold to the said Jane Symes, Richard Symes, and Christian Symes for the term of their lives, and the life of the longest liver of them successively, according to the custom of the said manor, as they were named in the said copy.

That at the time of the demise to the said Jane Symes, she was the wife of the said William Symes lord of the manor, that the said William Symes died in the year 1756, and that the defendant upon his death became, and still is rector of the said rectory and lord of the manor, and thereupon entered into the premises in question, and is in possession thereof.

The question is, whether the demise by copy of the court roll, by a lord of a manor to his wife, be good in law or not?

This case was argued twice at the bar, and being quite new, no authority could be cited to shew, whether the grant of this copyhold immediately from the husband (lord of the manor) to his wife was good or bad; nor did it appear to the court, that there was ever any such custom in *this*, or any other manor, for a lord to grant lands by copy of court roll to his wife immediately, without the intervention of a third person, and therefore it would be nugatory, to set down the cases cited by the counsel who argued; for the court cited no case that I heard.

CURIA: As this was a provision by a husband for his wife, we should be glad (if possible) to get over that maxim in law, "*that a husband and wife are one person*," and therefore cannot grant lands to one another; so where there is no particular custom in a manor, the common law must take place; this is an original voluntary grant by the husband to the wife, who cannot by law take immediately from him, any more than a monk who is dead in law, and considered as no person; so here is no person to take, for the wife and husband are only one person. We are dealing with a fundamental maxim of the common law, and might as well repeal the first section of Littleton, as determine this grant from the husband immediately to the wife to be good, and where there is not so much as the shadow of a person intervening. The *Postea* was ordered to be delivered to the defendant, *reluctante totâ curiâ*.

JEWELL v. PORTER.

1855. 31 *New Hampshire* (11 *Foster*), 34.¹

PETITION for partition of real estate. The petitioner claims to be seized as tenant in common of two undivided third parts. Certain petitionees claim the entire estate.

The agreed facts were, in part, as follows:

On January 1, 1811, Samuel Barnard, senior, being seized in fee of the whole real estate described in the petition, conveyed the same, by his warranty deed, of that date, to Samuel Tucke, who, at the same time, conveyed the same, by his quitclaim deed, of that date, to Elizabeth Barnard, wife of the said Samuel Barnard, senior. The consideration expressed in said deed from Barnard to Tucke, was \$5,000, but it did not appear that said Tucke paid the same. The said Elizabeth Barnard died in 1815, leaving three children, Mary Barnard, Samuel Barnard, junior, and Harrison S. Barnard, lawful issue of her and the said Samuel Barnard, senior, who died in 1848 or 1849.

On March 5, 1850, the said Mary and Harrison S. Barnard, by their warranty deed of that date, conveyed two undivided third parts of said real estate to Charles Jewell, the petitioner, who thereupon took possession of the same.

In 1817, Samuel Barnard, senior, was put under guardianship as a spendthrift. In 1830, his guardian, under a license from the Probate Court, sold the interest of his ward in said real estate. The petitionees, Porter and Rolfe, claim title derived under this sale, and also claim to have acquired the interest of Samuel Barnard, junior.

Stickney & Tuck, for the petitioner.

Bellows, for the petitionees.

¹ Statement abridged. Arguments omitted. — Ed.

EASTMAN, J. The deeds of Samuel Barnard, senior, to Tucke, and from Tucke to Elizabeth Barnard, dated January 1, 1811, gave a good title to Elizabeth Barnard.

A conveyance cannot be made by the husband directly to the wife. *Martin v. Martin*, 1 Greenl. Rep. 394; 2 Kent's Com. 129. But it may be done through the intervention of third persons; and the deed, if recorded, will pass the premises, if there are no creditors to interfere.

No creditors of Samuel Barnard interfere in this case; and the recording of the deeds, which an inspection of them shows to have been duly made, was notice to purchasers.

The title of Elizabeth Barnard was therefore good, and her children would inherit the estate from her, after her decease, subject to any life estate which their father might have in the premises.

Mrs. Barnard left three children, Mary, Samuel, jr., and Harrison S. This petitioner has the title of two of them, acquired by conveyances made after the death of both their parents; and holding, as we do, that the deeds of 1811 were effectual to pass the estate to Mrs. Barnard, the proceedings in the Probate Court, whatever may have been their character, and the conveyance under them could not give to Samuel Barnard, jr., any greater interest in the estate than that which Samuel Barnard, sen., had in the premises at the time the license was granted. It is therefore unnecessary to inquire particularly into the probate proceedings. A purchaser under them, and claiming title through them alone, could not acquire any greater interest in the land than that which belonged to the ward, which was only a life estate.

[The court *held*, that the petitioner has title to two undivided third parts; and that a committee should be appointed to make partition accordingly.]

SAVAGE v. WINCHESTER.

1860. 15 Gray (Massachusetts), 453.

APPEALS by the administrator of the estate of Edward Savage from the allowance by commissioners of insolvency of the claims of the plaintiffs against his estate. The cases were argued together at the last term in Hampden, and are stated in the opinion.

E. W. Bond, for the plaintiffs.

C. A. Winchester, *pro se*.

HOAR, J. In the first of these cases, the wife of a deceased debtor, whose estate is represented insolvent, and who had joined with her husband in a mortgage of her separate estate to secure one of his debts, having paid the debt since his decease, for the purpose of exonerating

her estate, now seeks to prove it against his estate before commissioners of insolvency.

In the second case, a creditor of the husband, who holds as security a mortgage of the separate estate of the wife, seeks to prove the debt in like manner, without surrendering the security.

The decision of both cases rests substantially upon the same principle, and we are of opinion that in each the plaintiff is entitled to recover.

It has been settled in this commonwealth that where the creditor of the insolvent estate of a deceased person holds a mortgage or other collateral security for his debt, which he received from the debtor, he cannot be admitted to prove his debt, except for the balance which may remain after deducting the value of the security, which is first to be ascertained by sale or appraisal, unless he will surrender the security to go into the common fund for the payment of all the creditors. *Amory v. Francis*, 16 Mass. 308; *Middlesex Bank v. Minot*, 4 Met. 325. But it is obvious that this rule could have no proper application to a case where the collateral security was furnished by a third person, not primarily responsible for the debt; because, if the security were first applied to the reduction of the debt, it would *eo instanti* create a new debt of equal amount in favor of the surety whose property was thus expended.

In the case of *Whitman v. Winchester*, the question simply arises, whether a mortgage made by the husband and wife, of the wife's separate estate, to secure the debt of the husband, is to be treated, in the settlement of the husband's estate in insolvency, as a security received from the husband, or from a third person, standing in the position, and entitled to the rights of a surety. In the other case, though the claim is made by the wife herself; and, as it was held in *Jackson v. Parks*, 10 Cush. 550, she can maintain no action against her husband's administrator upon a contract made with her by her husband; yet, as her title to the notes has accrued since her husband's death, there is no technical difficulty, and her rights are the same as if the claim were made in the name of the Springfield Institution for Savings, the original mortgagee.

The question thus presented is novel in the jurisprudence of this commonwealth; but it is settled in England by a series of decisions, and upon grounds which are satisfactory to us.

The general principle seems to be that the wife is regarded in equity as a feme sole, so far as her separate estate is concerned. When therefore the husband and wife join in a mortgage of her land to secure a debt of the husband, her estate is considered only as a security for the debt, for which the husband and his estate are primarily liable; and the wife or her heir will, after the death of the husband, be entitled to have it exonerated out of the estate of the husband. So strong and clear is this equity of the wife, that it may be asserted even by a creditor of hers, where her personal representatives refuse to take measures to enforce it. *Lancaster v. Evors*, 10 Beav. 154.

The early and leading case upon the subject is that of *Huntington v. Huntington*, 2 Vern. 437, in which the decision of the Lord Keeper

Wright against the right of the wife to the exoneration of her estate was reversed by the House of Lords. 2 Bro. P. C. (2d ed.) 1. In the subsequent case of *Tate v. Austin*, 1 P. W. 264, it was said by Lord Cowper, that although the mortgage should be regarded as the debt of the husband, yet "all other debts of the husband shall be preferred to this." And this limitation of the wife's right was recognized by Lord Thurlow in *Clinton v. Hooper*, 1 Ves. Jr. 189; putting it upon the ground that a contract between the husband and wife could not be implied in equity, when it would not be in law. But this distinction, which rests upon no foundation which would not be fatal to the claims of the wife in all cases, even against the husband's heirs or devisees, has been repudiated in all the more recent cases in England, and must be considered as no longer supported by authority. The rule was stated broadly, without any such restriction, by Lord Hardwicke in 1742, in the case of *Parteriche v. Powlet*, 2 Atk. 383; and in 1749 in a *dictum* in the case of *Robinson v. Gee*, 1 Ves. Sen. 252. In *Kinnoul v. Money*, 3 Swanst. 217 note, the same doctrine is held by Lord Camden; and in *Aguilar v. Aguilar*, 5 Madd. 414, it was decided that the wife was entitled to the exoneration of her estate, not only against her husband, but against his assignees in insolvency.

Pothier states the rule of the civil law to be, that "if, during the community of goods between husband and wife, an annuity, which was only due by one of them, has been redeemed by the money of the community, the other is, as to his or her part in the community, subrogated *pleno jure* to all the actions of the creditor against the debtor." 1 Pothier on Obligations, 521 *b*.

The courts of New York have sustained the doctrine in *Aguilar v. Aguilar* to the fullest extent, in the case of *Neimcewicz v. Gahn*, 3 Paige, 614, confirmed in the Court of Errors, 11 Wend. 312. The same doctrine is recognized also in *Hawley v. Bradford*, 9 Paige, 200; *Fitch v. Cotheal*, 2 Sandf. Ch. 29; and *Loomer v. Wheelwright*, 3 Sandf. Ch. 135.

We are therefore of opinion, that the notes of the husband, held by the plaintiff, were rightfully admitted to proof before the commissioners in insolvency, as a valid legal claim against his estate; and that there was no equity which would require the value of the mortgaged estates to be first deducted.

The agreed statement of facts finds that a part of the estate mortgaged had come to the wife, through mesne conveyances, from her husband. But this can make no difference, if it had lawfully vested in her as her separate estate. If there were any fraud in the transaction, which would make the conveyance inoperative against creditors, that should have been alleged and proved; but none is suggested.

Judgments for the plaintiffs.

SECTION X.

Suits between Husband and Wife. Tortious Damage by one Spouse to the Other.

PHILLIPS v. BARNET.

1876. *Law Reports*, 1 *Queen's Bench Div.* 436.

DECLARATION, that defendant assaulted and beat plaintiff, by means of which plaintiff became permanently injured in health, and was put to expense for medical and other assistance.

Third plea, that at the time of the committing of the grievances complained of, plaintiff was the wife of defendant.

Replication, that before suit the marriage of plaintiff and defendant was dissolved by the absolute decree of the Court for Divorce and Matrimonial causes.

Demurrer and joinder in demurrer.

C. Russell, Q. C. (*G. Browne*, with him), in support of the demurrer. [Argument omitted.]

J. Brown, Q. C. (*Beresford*, with him), for the plaintiff. The replication is good. The assault was a legal wrong to the plaintiff which could not be redressed during coverture, because the legal remedy was vested in the defendant and the plaintiff. The dissolution of the marriage has however removed this impediment, and the wife is now entitled to sue, the legal remedy being vested in her alone. It must be conceded that the assault is a wrong, for the right of the wife to obtain articles of the peace is not disputed. But it is said, that it is a wrong without a remedy. But the wife's disability was founded upon nothing but the necessity of joining her husband as plaintiff, a mere difficulty of procedure which no longer exists. Where husband and wife were living apart, and she had a separate maintenance, and he by his violence compelled her to exhibit articles of the peace against him, he was held liable for the expenses as being necessary for her protection. *Turner v. Brookes*, 10 A. & E. 47. And a wife after divorce is entitled for her sole benefit to such of her property and effects as were not reduced into possession by her husband during coverture. *Wells v. Malbon*, 31 Beav. 48, 31 L. J. (Ch.) 344. *Capel v. Powell*, 17 C. B. (N. S.) 743, 34 L. J. (C. P.) 168, shews that after divorce a man is not liable to be sued jointly with his wife, for a tort committed by her during the coverture. The doctrine that husband and wife are, in law, one person: Co. Litt. 3 a, Story, Equity Jurisprudence, § 1367, is superseded by the statutory divorce, under which the procedure is equitable. With regard to the argument founded on s. 32 of the Divorce Act, the court, if the husband by beating his wife had disabled her,

might perhaps take it into account in awarding alimony; but alimony is not varied by the extent of the husband's delinquency, or with the object of mulcting him as the guilty party. *Hooper v. Hooper*, 30 L. J. (P. M. & A.) 49.

BLACKBURN, J. I think that this action cannot be maintained. There can be no doubt that if a wife receives bodily injury from the hands of her husband he is liable to criminal proceedings for a felony or a misdemeanor, as the case may be; and in the case of an ordinary assault it is quite clear that the wife has a right for her protection to obtain articles of the peace against her husband, and upon this and upon other occasions she is in law a separate person. But the question, whether after a divorce a husband can sue his wife, or a wife her husband, for anything which has happened during coverture, depends upon very different considerations. I was at first inclined to think, having regard to the old procedure and the form of pleas in abatement, that the reason why a wife could not sue her husband was a difficulty as to parties; but I think that when one looks at the matter more closely, the objection to the action is not merely with regard to the parties, but a requirement of the law founded upon the principle that husband and wife are one person. It is laid down in Co. Litt. 3 a: "*A femme covert* cannot take anything of the gift of her husband." And in the note to this passage it is said: "Adjudged acc. in Chancery, 2 Vern. 385, and 3 Atk. 72. But the doctrine must be understood with various limitations. 1. Though the husband cannot convey to the wife immediately, yet he may give to a trustee for her benefit, and the gift will be good. Therefore he may convey land to her by way of use, as by enfeoffing or covenanting with another to stand seised, or surrendering a copyhold estate to her use." The note then refers to page 112 a, s. 168: "Though a man may not grant nor give his tenements to his wife during the coverture, for that his wife and he be but one person in the law, yet by such custom he may devise by his testament his tenements to his wife;" and in Coke's comment it is said, "This opinion is clear, for by no conveyance at the common law a man could, during the coverture, either in possession, reversion, or remainder, limit an estate to his wife. But a man may by his deed covenant with others to stand seised to the use of his wife, or make a feoffment or other conveyance to the use of his wife. . . . But a man cannot covenant with his wife to stand seised to her use, because he cannot covenant with her, for the reason that Littleton here yieldeth." Com. Dig. Baron and Feme (D. 1), is to the same effect, and an instance is given, that if a man make a bond or contract to a woman, and they afterwards intermarry, the bond or contract is discharged.

These authorities shew that the objection to the action is, not because it is one in which husband and wife ought to be joined, but because husband and wife cannot contract with or convey to each other. If the technical objection on the score of parties were the only one, either husband or wife, after the death of the other, might sue the executors

for acts done during coverture, and this I imagine has never been done. The reason, therefore, why the wife cannot sue the husband for beating her must be because they are one and the same person, and the same reason exists in criminal law, where a woman cannot be convicted of larceny, though she has in fact carried away her husband's goods. Other instances might easily be given, all shewing that the reason is not the technical one of parties, but because, being one person, one cannot sue the other.

Then, does the dissolution of the marriage by divorce make that a cause of action which was not so before? I do not see why it should. It is not difficult to see why such an action has not been brought before. There could be no question of bringing it except where the marriage was dissolved by a divorce, for if husband or wife died any action would be defeated by the rule *actio personalis moritur cum personâ*. Before the dissolution of the marriage the objection on account of parties would of itself prevent the action.

The 32nd section of the Divorce Act (20 and 21 Vict. c. 85) which enables the court in decreeing alimony to take into account the conduct of the parties, in some degree mitigates any hardship in the law, but my decision is without reference to that section, on the ground that there was no cause of action during coverture, and that the dissolution of the marriage does not give one.

LUSH, J.

Now it is a well-established maxim of the law that husband and wife are one person. For many purposes, no doubt, this is a mere figure of speech, but for other purposes it must be understood in its literal sense. For example, the husband cannot covenant with or make a grant to his wife, and she cannot in law be convicted of stealing his property. And it is laid down that if a husband is together with others charged with a crime, the wife cannot give evidence even against the others. It may be safely laid down, I think, that neither can acquire any civil rights against the other, or apply to any civil court to enforce them. For her personal protection the wife may exhibit articles of the peace against the husband, but, in my opinion, her remedy does not extend to the bringing an action against her husband. It remains to consider what is the effect of a divorce on this disability. Now I cannot for a moment think that a divorce makes the marriage void *ab initio*; it merely terminates the relation of husband and wife from the time of the divorce, and their future rights with regard to property are adjusted according to the decision of the court in each case.

[FIELD, J., delivered a concurring opinion.]

Judgment for the defendant.

PETERS, J., IN ABBOTT v. ABBOTT.

1877. 67 *Maine*, 304, pp. 307-8.

[In this case it was *held*, that a wife, after being divorced from her husband, cannot maintain an action against him for an assault committed upon her during coverture; nor against persons who confederated with him and assisted him in committing the assault. A portion of the opinion is as follows:]

PETERS, J. We are not convinced that it is desirable to have the law as the plaintiff contends it to be. There is no necessity for it. Practically, the married woman has remedy enough. The criminal courts are open to her. She has the privilege of the writ of *habeas corpus*, if unlawfully restrained. As a last resort, if need be, she can prosecute, at her husband's expense, a suit for divorce. If a divorce is decreed her, she has dower in all his estate, and all her needs and all her causes of complaint, including any cruelties suffered, can be considered by the court, and compensation in the nature of alimony allowed for them. In this way, all matters would be settled in one suit as a finality.

It would be a poor policy for the law to grant the remedy asked for in this case. If such a cause of action exists, others do. If the wife can sue the husband, he can sue her. If an assault was actionable, then would slander and libel and other torts be. Instead of settling, a divorce would very much unsettle all matters between married parties. The private matters of the whole period of married existence might be exposed by suits. The statute of limitations could not cut off actions, because during coverture the statute would not run. With divorces as common as they are now-a-days, there would be new harvests of litigation. If such a precedent was permitted, we do not see why any wife surviving the husband could not maintain a suit against his executors or administrators¹ for defamation, or cruelty, or assault, or deprivations that she may have wrongfully suffered at the hands of the husband; and this would add a new method by which estates could be plundered. We believe the rule, which forbids all such opportunities for law suits and speculations, to be wise and salutary and to stand on the solid foundations of the law.

¹ Under the statutes of Maine, the actions of assault and battery, and trespass, survive; and "may be commenced by or against an executor or administrator." Revised Statutes, edition of 1871, chap. 87, s. 8. — ED.

SECTION XI.

Husband and Wife as Witnesses for, or against, Each Other.

STAPLETON v. CROFTS.

1852. 18 *Queen's Bench* (*Ad. & Ell. N. S.*), 367.¹

ASSUMPSIT for goods sold and delivered. Plea, non-assumpsit. Issue thereon.

On the trial before ERLE, J., at the sittings at Westminster in last term, the defendant's wife was called as a witness for the defendant. The evidence was objected to; but the learned judge admitted it. Verdict for the defendant.

In the ensuing term *Huddleston* obtained a rule *nisi* for a new trial, on the ground of the improper reception of evidence.

Montague Chambers, and *Welsby* now showed cause.

[Counsel who argued in favor of the competency of the wife in this case, and in the similar case of *Barbat v. Allen*, 1852, 7 Exch. 609, virtually admitted that the wife, at common law, would not have been a competent witness in a civil case to which her husband was a party. But it was claimed that she had been made a competent witness by the Statute 14 & 15 Vict. ch. 99. The Statute 6 & 7 Vict. ch. 85, enacted that no witness should be excluded by reason of interest, "Provided that this Act shall not render competent any party to any suit, . . . or the husband or wife of such persons respectively." The subsequent Statute, 14 & 15 Vict. ch. 99, s. 1, expressly repeals so much of 6 & 7 Vict. ch. 85, as provides that the Act shall not render parties competent witnesses. Sect. 2 of the later Act makes parties competent witnesses. Sect. 3 provides that nothing herein contained shall render the accused in any criminal proceeding competent or compellable to give evidence for or against himself, "or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband."]

Huddleston and *Holl*, *contra*.

LORD CAMPBELL, C. J. I regret to be obliged to say that, in my judgment, the rule must be absolute; for my private opinion is that it would be an improvement on the law to admit the testimony of married persons, for or against each other, subject to some restrictions. I think they ought not to be permitted to disclose confidential communications, or to criminate each other: but subject to limitations, I think that the admission of their testimony would forward the ends of justice. How-

¹ Arguments omitted. — Ed.

ever, I am now to declare what the law is ; and for that purpose I must look to the statute as it has received the Royal assent. I cannot take into consideration the history of the bill, or speculate on the intentions of those who promoted or altered it, but must look to the Act as it is. Now it is quite clear that before Lord Denman's Act (6 & 7 Vict. c. 85), the wife could not be called for or against her husband. When the issue was between strangers, the husband and wife might be called, though they contradicted each other, even to the extent to which it was carried in *Annesley v. Earl of Anglesey*, 17 How. St. Tr. 1276 ; but where the husband himself was the party the wife could not be called for or against him. One reason given by Lord Coke in Co. Litt. 6*b*, and adopted by Lord Hardwicke, is the preservation of the peace of families. Such being the law, and one of the reasons for it, Lord Denman's Act contained an express provision that that Act should not render admissible parties to the record, or their husbands or wives. Stat. 14 & 15 Vict. c. 99, does not, as I think, either expressly or impliedly admit the testimony of the wife which was before inadmissible. Sect. 1 repeals a part only of the proviso in Lord Denman's Act ; but, had it repealed the whole of that proviso, the case of the wife would not be within the purview of the Act, which was pointed only at objections on the ground of interest. The enabling clause of Stat. 14 & 15 Vict. c. 99, is sect. 2, which certainly does not expressly admit the wife of the party ; but it is urged that it does so impliedly, inasmuch as the wife and husband are one person. But the maxim cannot be understood in this sense. It might as well be said that under a ca. sa. directed against the husband the wife might be taken in execution because she and the husband were one.

Stress is laid on sect. 3, where it is enacted that the husband and wife shall not be competent or compellable to give evidence against each other in any criminal proceeding. If there were such language as left it doubtful whether the construction of the Act was such as to admit the evidence of the wife, this would afford an argument in favor of that construction ; but I cannot think it is sufficient by implication to make them admissible in other than criminal proceedings. Such has been the opinion of Lord Truro, and of the Court of Exchequer. If I entertained a different opinion it would be my duty to express it, until the decision of a higher court set me right ; but I agree with them.

WIGHTMAN, J. It is contended that the objection to the admissibility of the wife is removed by Stat. 14 & 15 Vict. c. 99. That Act, however, in its terms applies only to " the parties " to any suit. Now the wife of a party is not herself a party to the suit ; and the terms of the Act do not embrace this case. But, independently of the terms of the Act, I think that the object appears to have been to complete the removal of objections on the ground of interest : and the objection to admitting the wife of a party is not merely on the ground of her identity in interest with her husband, but depends upon a broader view of the relation of husband and wife, and on the interest which the public

have in the preservation of domestic peace and confidence between married persons.

[The concurring opinion of CROMPTON, J., is omitted.]

ERLE, J. I am of opinion that Stat. 13 & 14 Vict. c. 99, s. 2, rendering parties to a suit competent witnesses, has rendered the wives of parties also competent.

The law relating to exclusion of evidence on account of interest gave effect to the principle of uniting the interest of husband and wife. If the husband was excluded on account of interest, so was also the wife on account of her united interest; and, if the capacity of the husband was restored, the wife became thereby also capable. Although the wife had no direct interest during coverture in personal property, she was taken to have an indirect interest derivative from that of her husband.

The party to a suit was both excluded and exempted on account of his interest. For the same reason and from the same union of interest the wife of a party was also exempted and excluded. If capacity was restored to the parties by judgment by default, by *nolle prosequi* or otherwise, the capacity of the wife was also restored thereby. It seems to me to follow that, when the incapacity of parties is taken away by statute, the incapacity of the wives of parties should also cease, and the union of capacity or incapacity be still maintained.

This brings me to the question whether there was any other principle for excluding the wife of a party besides this union of interest and privilege between husband and wife. Upon the affirmative side, authorities are cited for exclusion of the wife with a view to preserving the peace of families; they are collected in Taylor on Evidence, vol. 2, p. 899, where it is said the admission of such testimony would lead to dissension and unhappiness, and probably to perjury, and because the confidence subsisting between husband and wife should be sacredly cherished.

There is no doubt that the law most carefully protects the interests connected with marriage, and established the union of interest above mentioned for the purpose of domestic union, and excluded the testimony of the wife, where the husband was excluded, on account of this union; and the expressions above cited, if confined to the exclusion of the wife when the husband is excluded, have a definite meaning, capable of a practical application: but, if they are carried beyond this limit, and are supposed to introduce tendency to domestic discord as a ground of exclusion, they will be found to be contrary to known principles of evidence, and to be incapable of being consistently applied. For, if this ground of exclusion existed, it would apply to other witnesses, as well as to parties, their domestic peace being equally important. But it is clear with respect to witnesses, not parties, that they cannot refuse to be examined on any ground derived from marriage, and that husbands and wives may mutually contradict and discredit each other upon matters full of family dissension, as freely as if the marriage was null.

Even if it could be supposed that the law regarded only the domestic peace of parties, and protected their confidence, still the supposed ground of exclusion is not consistently applied; for, if a husband is assaulted or libelled, he may seek redress either by action or indictment. In either form he is in substance the party. If he proceeds by action, he and his wife were incompetent. If by indictment, both are admissible either to corroborate, or contradict or discredit each other. Now, if the principle of excluding the wives of parties was protection of domestic peace and confidence, the wife ought to be excluded equally in both cases: but she was excluded only in the action, where, as the husband was also incompetent, it seems better reasoning to attribute her exclusion to the uniform principle of union, than to suppose a regard for domestic peace in the civil court, to be neglected in the criminal court.

With respect to the protection of confidential communications between husband and wife, there seems good reason for such protection at all times: but no such principle has been brought into practice.

The decisions excluding the wives of parties have been accompanied with general declarations in favor of such protection. But, as the exclusion extended to all the testimony of the wives of parties, whether it was confidential or not, and as no protection was given to conjugal confidence in respect of the wives of witnesses, not parties, who are as much within the reason of the rule, if it existed, as the first mentioned class, I think the rule has not yet been established.

As to the authorities, most of the decisions for the exclusion of the wives of parties were given in cases when the husband was excluded, and so are consistent with the principle of union of admissibility. In *Bentley v. Cook*, 3 Doug. 422, the wife was plaintiff, and so the husband was excluded; in *Davis v. Dimwoody*, 4 T. R. 678, the wife's trustees were plaintiffs on her behalf, and so the husband was excluded; and thus in *Hucksworth v. Showler & Boyce*, 12 M. & W. 45, the wife of Boyce was excluded from giving evidence for Showler, because she was the wife of a party to the issue under trial, who was incapacitated either for or against himself, and the same incapacity extended to the wife.

The decisions excluding the wife where the husband was not excluded, upon some general purpose of promoting conjugal peace, appear untenable.

In *Broughton v. Harpur*, 2 Ld. Ray. 752, the question in ejectment was whether the plaintiff was son and heir of Hannah Jaques; and the first wife of Jerome Jaques was called by the defendant to prove that his supposed marriage with Hannah was null because she had been previously married and was still alive, and was rejected on the ground, as mentioned in the report, that she swore to her advantage to get a husband, but on the ground, as mentioned in some later cases, that she would criminate her husband of bigamy, and, in others, that she would occasion dissension with her husband. But her evidence would oper-

ate nothing in regaining her husband ; nor would it criminate him more than the public offer of it : and dissension was not probable ; and according to the law, as now settled, the witness would be admitted.

In *Rex v. Cliviger*, 2 T. R. 263, upon a question of the settlement of a woman as a wife, the former wife of the alleged husband was held inadmissible to prove the former marriage, and contradict the husband, because it might tend to criminate him of bigamy and perjury. Here also the public offer of the evidence had all the tendency that the evidence would have had ; and here also evidence essential for ascertaining the truth was excluded lest a tendency should be created which already existed. The principle of exclusion laid down in this decision was received with dissent by the court in *Rex v. All Saints Worcester*, 6 M. & S. 194, and in *Rex v. Bathwick*, 2 B. & A. D. 639 ; and in these cases the exclusion of the wife was said to be confined to cases where the husband was a party. They therefore in effect deny any direct ground of exclusion on account of domestic peace, as applicable to all witnesses. In *O'Connor v. Majoribanks*, 4 M. & G. 435, the widow was held incompetent to prove the authority of her deceased husband to pledge some property for a loan, on the ground that confidential communication between husband and wife should be protected : and, although the communication in question was not confidential but intended to be divulged, the court thought it necessary to exclude evidence of all communications, to secure the exclusion of those which were confidential. I may be allowed to doubt this necessity, and to inquire whether it is satisfactory to sacrifice the interest of truth by excluding essential evidence for the sake of protecting a confidence which never existed.

These cases lead me to the conclusion that from the union of interest between husband and wife there was a union of incapacity, and upon a restoration of capacity to the one the other is also rendered admissible.

The legislative authority for the admission of wives is strong. In the county courts they are made competent ; there has been ample experience of their evidence ; and no objection has been made. In bankruptcy the necessity for examining the wives of bankrupts has been long recognized ; and, under the statute now to be construed, the wives, if parties to the record, are admissible for or against their husband ; and inconsistency is attributed to Parliament if it be supposed to have intended that the wives of parties generally should be excluded, but the wives of parties, having an individual as well as conjugal interest, should be admissible.

If the question may be considered with reference to the interest of truth, it is clear the exclusion of essential information as a means for finding truth is absurd. It is not doubted that wives often possess essential information as to matters within the usual province of a wife, and as to those conducted by her as agent for her husband, and as to those which she has happened to witness.

If essential witnesses are excluded, there is the certain evil of decid-

ing without knowledge, and there is the probable evil of shaking confidence in the law: these evils are certain; and, if the notion of a compensating good in the promotion of domestic happiness by rendering the wife powerless as a witness be analysed, I believe it will be found illusory. The idea that husbands generally would suborn their wives to perjury, and persecute them if they spoke truth, is, to my mind, unworthy of the time; there is no reason for supposing that wives, if admitted, would be worse treated in respect of their testimony than in respect of any other part of their conduct, or be more prone to untruth than any other class of witnesses: and, if, by reason of the exclusion of the wife, the husband has to suffer an adverse judgment contrary to truth, and the consequent loss, he would dissent with much reason from the zealous declarations that such a mean for protecting the peace of his family and the sanctity of his marriage was better than administering the law according to truth.

These observations apply to the present case; for the husband was examined, and did not understand the matters in question, which had been managed by his wife. If she had been excluded the verdict would have been for the plaintiff, and the defendant would have been made liable to a demand contrary to the truth. As these considerations were in my mind before the judgment of the Exchequer in *Barbat v. Allen*, 9 Exch. 609, and as they refer entirely to the effect of the second section, which was not much discussed in that case, I trust I am not wanting in deference if I say that my opinion is not changed.

Rule absolute.

WHIPP v. THE STATE.

1877. 34 *Ohio State*, 87.¹

ERROR to the Court of Common Pleas of Medina County.

The plaintiffs, Rachel H. Whipp and Lonsdale P. Spensley, were jointly indicted and tried for a felonious assault upon Robert Whipp, the husband of said Rachel, "with intent him, the said Robert, to kill and murder." The record shows that said Robert Whipp was permitted, against the objection of both the plaintiffs, to testify to the circumstances of the alleged assault. The plaintiffs were convicted and sentenced to the penitentiary.

The ruling permitting the husband to testify against his wife is the principal error assigned. Other exceptions were taken at the trial not material to be noticed here.

H. McKinney, for plaintiff in error.

Isaiah Pillars, Attorney-General; *James Pillars*; *John McSweeney*; *J. T. Graves*, prosecuting attorney, and *Bostwick & Barnard*, for the State.

¹ Arguments omitted. — ED.

BOYNTON, J. At common law, the general rule is well settled, that husband and wife are incompetent to testify for or against each other, either in civil or criminal cases. And while the rule has been largely modified in civil cases, and the incompetency to a great extent removed, in criminal cases it still prevails. *Steen v. The State*, 20 Ohio St. 333. But at an early date, an exception, said to arise from necessity, was declared to exist in cases of personal injury to the wife inflicted by the husband. The first reported case, in which the point was adjudicated, was that of Lord Audley, decided in 1631. He was accused of aiding and assisting another in the commission of a rape upon his wife; and upon the trial the question of the wife's competency to give evidence against him was submitted to the judges, who unanimously resolved, that, being the party upon whom the crime was committed, she was a competent witness.

Excepting a few cases at *nisi prius*, where the wife's testimony was rejected (*Rex v. Griggs*, 1 L. Raym. 1), the exception has uniformly prevailed, and is now as firmly established as the rule itself. *Rex v. Azire*, 1 Stra. 633, was a case of a simple assault by the husband upon the wife, and her testimony was admitted. Where the husband was indicted for shooting at his wife, she was held a competent witness. Roscoe's Cr. Ev. 125. In *Rex v. Jagger*, 1 East P. C. 455, the husband was tried and convicted of an attempt to poison his wife, and she being admitted as a witness against him, the twelve judges, upon a point reserved, held that her evidence was properly received. *Rex v. Wasson*, 1 Crawf. & Dix, 197, was a similar case, and decided the same way.

In *Woodcock's case*, 1 Leach, C. C. 500, and in *Rex v. John*, 1 East P. C. 357, the dying declarations of the wife were received against her husband, upon the principle there asserted, that had she survived, she would have been competent to establish the violence that resulted in death.

The same principle prevails in cases where the wife is called by the husband. In *Murphy v. Commonwealth*, 4 Allen, 491, it was held, that on an indictment against the husband, for an assault upon the wife, she is a competent witness for him, to disapprove the assault. See also *Rex v. Sergeant*, R. & M. 352; *State v. Neil*, 6 Ala. 685.

But it is said that if the rule permitting the wife to testify in these exceptional cases, is admitted at all, it is restricted and confined to cases where there are no other witnesses to the transaction in which the wife was injured. This limitation, although adopted in one or two of the earlier cases, has long since been rejected. In *Bentley v. Cooke*, 3 Doug. 422, it was said by Lord Mansfield, that the "necessity which calls for this exception is not a general necessity, as where no other witness can be had, but a particular necessity as where, for instance, the wife would otherwise be exposed without remedy to personal injury." And in *Reeve v. Wood*, 5 Best & Smith, 364, Crompton, J., giving a wider foundation to the exception, and a more satisfactory reason for

its existence, said: "The exception to the general rule, excluding the wife as a witness against her husband, arose partly from the mischief which would have followed from her exclusion, partly from necessity, and partly from the consideration that she was in reality the prosecuting party." The principle upon which either of these cases asserts the competency of the wife in prosecutions for an injury to her person, committed by the husband, renders the presence or absence of third persons, at the time of the assault, entirely immaterial.

It remains to inquire whether the same principle or rule obtains where the husband sustains a personal injury through the unlawful conduct of the wife. We have not been referred to any case directly deciding the point. The elementary writers are fully agreed that the husband is equally competent to testify, where he is the party injured through the personal violence or misbehavior of the wife. In *Best on Evidence*, 271, it is said: "Where one of the married parties used, or threatened, personal violence to the other, the law would not allow the supposed unity of person in the husband and wife to supersede the more important principle that the State is bound to protect the lives and limbs of its citizens. Thus, in an indictment for an assault and battery on the wife, or *vice versa*, the injured party is a competent witness."

In 1 Arch. Cr. Pr. & Pl. 472, the author says: "A wife cannot be examined as a witness for or against her husband, or a husband as a witness for or against his wife, except in case of a personal injury committed by the one upon the other, in which case, from necessity, the one may be a witness against the other." Mr. East, in 1 East P. C. 455, closes a discussion of the exception to the general rule, by saying: "I conceive it to be now settled, that in all cases of personal injuries committed by the husband or wife against each other, the injured party is an admissible witness against the other." 1 Whar. Cr. L. § 767; 1 Greenlf. Ev. § 343; 2 Bish. Cr. Prac. § 69; and Stephen's Dig. of Evidence, art. 108, are to the same effect.

We are of the opinion that the exception stated prevails where either the husband or wife is on trial for a personal injury inflicted on the other, and that the party injured is a competent witness against the other.

In *Steen v. The State*, *supra*, the court declared the general rule. It was not a case of bodily injury to the wife. The question of the existence of an exception to the rule, excluding the wife from testifying against her husband, was not considered or decided. The remaining exceptions to the ruling of the court below do not present any question, the decision of which it is important to report. It is sufficient to say that, in our judgment, no error was committed at the trial.

Judgment affirmed.

SECTION XII.

Effect of Marriage on the Ante-Nuptial Liabilities of the Parties to Each Other.

ABBOTT v. WINCHESTER.

1870. 105 *Massachusetts*, 115.

CONTRACT against the administrators of the estate of Rodolphus Converse, on a promissory note made by him, dated August 25, 1856, and payable on demand to Maria Clark or order. The note was given in payment for services rendered to the maker by the payee; and was left in the hands of the attesting witness, for the benefit of the payee. The maker and payee intermarried, September 24, 1856. After the marriage, the note remained in the hands of the witness for some time, and then was delivered to the maker, who held it for the benefit of the payee some years, and until a few weeks before his death, when he delivered it to her. She then for the first time had the note in her personal possession. After her husband's death she indorsed the note to the plaintiff. The case was submitted on the above facts to the judgment of the Superior Court, and, on appeal, of this court.

M. P. Knowlton, for the plaintiff.

C. A. Winchester, for the defendants, was not called upon.

CHAPMAN, C. J. The note in suit was given by Rodolphus Converse, the defendants' intestate, to Maria Clark, August 25, 1856. It was given in payment for services rendered to the maker by the payee, and was left in the hands of the attesting witness. On the 24th of the following month the parties intermarried; and sometime afterwards it was delivered to the maker, who kept it for the benefit of his wife till a few weeks before his death.

The principle stated in *Chapman v. Kellogg*, 102 Mass. 246, must govern this case. The note became a mere nullity, and could not be revived by the death of the husband.

*Judgment for the defendants.*¹

¹ In *Chapman v. Kellogg*, 1869, 102 Mass. 246, p. 248, a note made by a single woman was, after the promisor's marriage, sold and indorsed by the payee to her husband. CHAPMAN, C. J., said (*inter alia*): "The question presented is, whether this title in the husband operated to extinguish the contract. At common law, there can be no doubt that it would have done so. One of the reasons for the extinguishment would be, that the husband became liable by the marriage for its payment. The statute has taken this ground away, by releasing the husband from his liability for his wife's debts. But another ground was, that he could not maintain an action against his wife on a contract, because there could be no valid contract between them. This principle has not been changed by statute. A contract between husband and wife is still a nullity."

See Massachusetts Statute of 1855, ch. 304, sect. 1, not referred to in *Abbott v. Winchester*, but commented upon in 2 Bishop's Law of Married Women, sect. 336. — ED.

MILBOURN v. EWART.

1793. 5 Term Reports (*Durnford & East*), 381.

THIS was an action of debt on bond for £6,000 dated the 10th of January, 1782, and executed by J. Milbourn, deceased, the late husband of the plaintiff, against the defendants, the heirs at law of J. Milbourn. The defendants (after craving oyer of the condition, which was “for the payment of £3,000 by the heirs or executors of the obligor to the plaintiff, her executors, &c. at the expiration of twelve calendar months from and after the death or the obligor”) pleaded that after the making of the writing obligatory, namely, on the said 10th of January, 1782, the obligor “took to wife and intermarried with the plaintiff, and the plaintiff then and there became covert of and wife to the obligor, and continued so to be until and at the death of the obligor,” &c. The plaintiff replied, that the bond was made in contemplation of a marriage to be had and solemnized between her and the obligor, and with an intent that in case the marriage should take effect, and the plaintiff should survive him, the plaintiff should have the full benefit and effect thereof. To this replication there was a general demurrer and joinder in demurrer.

Chambre, in support of the demurrer, contended that by the marriage the bond was extinguished. [Argument omitted.]

Wood, *contra*, was stopped by the court.

LORD KENYON, C. J. I have no doubt whatever either of the justice or law of this case. The short statement is this; a person, who was about to marry, on the day of his marriage gave a bond to the person to whom he was to be married, by which he stipulated that his representatives would, within twelve months after his death, pay to his widow or her representatives £3,000; he married, and afterwards died; and his widow having brought an action on the bond, we are now told that in a court of law that money cannot be recovered. But I am very glad to find that that is not, nor ever was, considered as the law. To the proposition that a person by marrying his creditor releases the debts of his wife, I am ready to accede: but is it to be said that a man cannot bind his property in favor of his wife, and that he cannot make it liable to the payment of such a debt as this? — All the arguments on this point are to be found in the case in 1 Ld. Raym. 515, where Lord Holt differed in opinion from the rest of the court. I cannot but lament that he had recourse to such flimsy and technical reasonings to enforce a case so directly against law and conscience. It was doubted whether equity would give the defendant in that case relief; referring to a case in Chan. Cas.; which indeed seems to warrant that opinion. But it must not be forgotten that that case was determined by Lord Chancellor Clarendon, who after an absence from courts of justice for many years, was then recently returned to this country, and had not been for some time in habits of business. But at this time it cannot be doubted

but that a court of equity would enforce such an engagement. It is the constant and uniform practice of the Court of Chancery that the husband shall stand seised as a trustee for his wife. In *Cage v. Acton*, Lord Holt had recourse to some technical arguments, which are not applicable here: one of them was, that it was a present debt "to be paid when he should be required;" that, therefore, the wife might have required him to pay it during his life-time, and yet that she could not maintain an action against him. But that objection does not arise here; for the bond was not payable during the life-time of the obligor, nor until twelve months after his death. I am glad to find that even in that case the opinions of the two other judges occasioned a majority against that of Lord Holt; and if those two judges had been of less eminence than Mr. J. Gould and Mr. J. Turton were, I should not have thought that much deference ought to be paid to the opinion of Lord Holt there delivered, which was as repugnant to the rules of law as of equity.

ASHMURST, J. Although no case had been decided upon this subject, I could not have brought myself to hold that the marriage extinguished this bond; I should rather have been inclined to adopt the principle, stated in the case cited, that "the law will not work a wrong." 1 Lord Raym. 517. The general principle is, as has been insisted upon, that if a man marry his debtor, the debt is extinguished: but it does not follow that a case may not be so circumstanced as not to come within that rule. I see no objection to the averment in the replication; for it appears on the defendant's own shewing that the marriage was solemnized on the day when the bond bears date; and the averment by the plaintiff that the bond was given in contemplation of marriage, and as a settlement on the wife, does not militate against the bond and condition: on the contrary, it explains, and is in affirmance of, the condition of the bond. "The bond was given for the purpose of making a provision for the wife, in the event of her surviving the obligor; and it would be iniquitous to set it aside on account of the marriage, since it was for the event of the marriage that the bond was meant to provide. However, the case does not depend on principle only; for the case of *Cage v. Acton* is directly in point.

BULLER, J. The first question is, Whether this replication be or be not good? It states, shortly, that the bond was given before marriage, in contemplation of the marriage, and with an intent to secure a certain sum of money to the wife in the event of her surviving her intended husband. The cases alluded to, from Cowper, and 2 Wilson, do not apply to the present; for the facts disclosed by this replication are perfectly consistent with the bond; therefore it does not appear to me that there is the least objection to the replication. The other point is so settled that it ought not to be now questioned. It has been supposed, in the argument, that the case in Lord Raymond was reversed: were that supposition warranted, the defendant's counsel would probably have referred us to the record of reversal. But it does not appear, in any of the printed reports of the case, to have been reversed; and

that by Carthew supposes the contrary. I have also an additional reason for thinking that that judgment was not reversed: that was one of the cases in which Lord Holt gave a very persevering opinion against the opinions of the majority of the judges here; and he has preserved the judgment in his manuscript notes without adding any memorandum to it respecting its being reversed, which he always introduced upon other occasions where his judgments were reversed or affirmed. The case in Lord Raymond is confirmed by another, alluded to in *Foord v. Foord*. [Here Mr. J. BULLER read the following note. *Hayes ex dem. Foord v. Foord*, Tr. 9 G. 3 B. R. This was a long special verdict, brought by writ of error from Ireland, on a long and intricate will; and in the principal case there was very little worthy of observation: but Mr. Jones in arguing it, and speaking of the different construction and rules which in many cases prevailed in equity, contrary to what were allowed in courts of law, said, "that there was this distinction allowed between a trust and legal estate, that the particular tenant of a trust estate could not bar a contingent remainder;" "and in the case of a bond given before marriage by a man to a woman by way of a settlement (he said), that at law the bond was extinguished by the marriage, but that equity would set it up again after the death of the husband." As to which Lord Mansfield said, "that was a mistake; for the bond was not extinguished at law; and Mr. Justice Wright, who was one of the strictest law judges that ever sat in Westminster Hall, allowed such a bond which had been paid to be given in evidence on a plea of *plene administravit*;" and (Lord Mansfield said that) he thought he did quite right."]

GROSE, J. As to the first point; it is clear that the contents of the replication are not only not inconsistent with, but support, the bond and the declaration. With regard to the other question, on the merits of the case; I should have lamented that the effect of the marriage had been to destroy that which was given as a security in case the marriage took effect: but by the marriage the bond was not destroyed. On looking into the case of *Cuge v. Acton*, as it appears in the different reports, I think either that the judgment was affirmed, or that the plaintiff in error deserted his writ of error. It is true that in Vern. 481 there is a *dictum* by one of the counsel, that "the bond was released in law by the marriage": but from what passed in the court, the judgment must have been affirmed; for the Lord Keeper decreed that the bond was a charge on the husband's real estate. Therefore, as well on the authorities as on the justice and conscience of the case, I am of opinion that the plaintiff is entitled to judgment.

Judgment for the plaintiff.

CANNEL *v.* BUCKLE.1724. 2 *Peere Williams*, 242.

A *FEME sole* was seised in fee of land of about £10 *per annum*, and designing to marry, agreed with her intended husband, that she upon the marriage would convey her lands to the husband and his heirs; and for that purpose, previous to the marriage, she gave a bond of £200 penalty to the intended husband, in which the intended marriage was recited, and the condition was, that in case the marriage took effect, she would convey all her said lands to the husband and his heirs.

The marriage took effect, and there was issue of the marriage, and the wife made her will reciting her said bond, and devised all her land to her husband in fee and died.

The issue of the marriage died without issue; after which the husband enjoyed the land during his life, and on his death the heir of the husband brought a bill against the heir of the wife, to compel him to convey the lands of the wife to the heir of the husband.

Obj. This bond given by the wife became void upon the intermarriage, because it was then suspended; and a personal action once suspended is extinct: besides, wherever no action lies at law to recover debt or damages, there no suit in equity lies to compel a specific performance, which specific performance is given in equity only in lieu of damages; and 1 Chan. Cases, 21 (*Lady Darcy's case*), was cited, proving that where a woman on a treaty of marriage agrees with a man, or a man with a woman, there the subsequent intermarriage determines the agreement.

LORD CHANCELLOR [MACCLESFIELD]. The impropriety of the security, *viz.* a bond from a woman to a man whom she intends to marry, or the inaccurate manner of wording such bond, is not material; for it is sufficient that the bond is a written evidence of the agreement of the parties, that the *feme* in consideration of marriage agrees the man shall have the land as her portion; and this agreement being upon a valuable consideration shall be executed in equity. It is unreasonable that the intermarriage, upon which alone the bond is to take effect, should itself be a destruction of the bond, and the foundation of that notion is that in law the husband and wife being one person, the husband cannot sue the wife on this agreement; whereas in equity it is constant experience, that the husband may sue the wife or the wife the husband, and the husband might sue the wife upon this very agreement in the principal case. Neither is it a true rule which had been laid down by the other side, that where an action cannot be brought at law on an agreement for damages, there a suit will not lie in equity for a specific performance, as is plain from this case: suppose a *feme* infant seised in fee, on a marriage with the consent of her guardians, should covenant in consideration of a settlement to convey her inheritance to her husband; if this were done in

consideration of a competent settlement, equity would execute the agreement, though no action would lie at law to recover damages.

But in regard this bond was a very stale one (being given so long since as in 1678) and the husband had for so long a time omitted to sue upon it in equity, the court ordered a trial at law to see whether this bond was executed or not, and all other matters to be respited till after the trial. Reg. Lib. A. 1723, fol. 484.

SECTION XIII.

Ante-Nuptial Contracts, and Ante-Nuptial Torts, of Wife.

HAWK v. HARMAN.

1812. 5 Binney (*Pennsylvania*), 43.

ERROR to the Common Pleas of Dauphin County.

Upon the trial of this cause, which was an action by Hawk and wife for slanderous words spoken of Elizabeth the wife of Hawk, *dum sola*, by Catharine the wife of Harman (whether sole or covert at the time, the *narr* did not state), the Common Pleas reserved the point, whether a husband is liable for slanderous words spoken by his wife before marriage. The verdict was for the plaintiff, forty shillings damages, and six cents costs; and the court, after argument upon the reserved point, set aside the verdict, and gave judgment of nonsuit, upon which this writ of error was brought.

Goodwin, for plaintiffs in error.

Elder, for defendants in error.

TILGHMAN, C. J. The only question in this case is, whether an action will lie against a man and his wife for slanderous words spoken by the wife before marriage. It is a question which does not admit of a doubt. The wife cannot be sued without her husband; and if the action does not lie against both, it follows that a woman by her own act may defeat the plaintiff's action, a principle not to be endured, unless a positive adjudication on the point could be produced in support of it. But the defendant in error relies on the general position to be found in some books of authority, that a man is liable to answer for his wife's *contracts* before marriage. To be sure he is, but it must not be inferred, that he is not answerable for her *torts* also. The expressions do not necessarily bear that import, and in candid construction, they ought not to be so expounded. It would be attributing to respectable authors an unaccountable mistake, for there is not wanting express authority to the contrary. If a *feme sole* is sued for a trespass, and marries, the action shall proceed against her, and if she is found guilty, judgment and execution shall be had against her alone without naming her husband. *Doyley v. White*, Cro. Jac. 323, cited in Buller's Ni. Pri. 22. But if the suit is brought *after* the marriage, for a trespass committed by the *feme while sole*, it shall be against the *husband* and *wife*, and what is somewhat singular, the writ charges the trespass as having been committed by *both*, because there is no other form of writ in the register. It was so decided 22 Ass. pl. 87, Jenk. Cent. 23, pl. 43, cited in 4 Vin. 185, C. l. pl. 14. So if a *feme disseisoreess* marries, the writ against the husband and wife shall be *quod disseisiverunt*, and not *quod uxor dum sola disseisivit*. In these

cases there was no question about the action lying against the husband and wife; the only doubt was, whether the form of the writ was right. I am therefore of opinion, that the judgment should be reversed, and judgment entered here for the plaintiff below on the verdict.

[The concurring opinions of YEATES, J., and BRACKENRIDGE, J., are omitted.] *Judgment reversed.*

MITCHINSON v. HEWSON.

1797. 7 Term Reports (Durnford & East), 348.

IN assumption, the first count stated that the defendant was indebted to the plaintiff in £50 for work and labour before the defendant's intermarriage with Ann his wife, and while the said Ann was a widow, done and performed and for divers medicines found and provided by the plaintiff for her and for her three sons by her former husband at her special instance and request, and being so indebted the defendant promised to pay, &c. There was another count for work and labour, &c., for the defendant's wife before her marriage with the defendant. The defendant pleaded the general issue; and the plaintiff obtained a verdict for £10 18s.

Bayley moved in arrest of judgment last term, because the wife ought to have been joined with the husband in the action, the cause of action being a debt of the wife's before the marriage. For which he cited *Robinson v. Hardy*, 1 Keb. 281, 440, and *Drue v. Thorn*, All. 72.

Raine now shewed cause against a rule obtained for that purpose. The question is whether the intermarriage between the defendant and his wife is not a good consideration for the promise; for after verdict it may be presumed that there was evidence of a promise in writing by the husband to pay the debt. In *Hawkes et Uxor v. Saunders*, Cowp. 290, Lord Mansfield said, "Where a man is under a legal or equitable obligation to pay, the law implies a promise, though none was ever actually made; *à fortiori* a legal or equitable duty is a sufficient consideration for an actual promise. Where a man is under a moral obligation which no court of law or equity can enforce, *and promises*, the honesty and rectitude of the thing is a consideration." Here no doubt the husband is bound legally in conjunction with his wife; therefore he is under both a moral obligation and an equitable duty to pay her debt alone, which is sufficient in law to sustain a promise to pay it. In the case of a debt due to the wife before marriage the husband alone may sue for it; then it seems reasonable that he may be sued alone for her debts contracted before, if he promise to pay them. To shew that he may so sue he cited *Howell v. Maine*, 3 Lev. 403, 1 Com. Dig. 156 (E), 1 Rol. Abr. 32, l. 20; *Hilliard et Uxor v. Hambridge*, All. 36; *Blackborn et Uxor v. Greaves and others*, 2 Lev. 107; *Oglander v. Baston*, 1 Vern. 396; *Bond v. Simmons*, 3 Atk. 21; and *Garforth v. Bradley*,

2 Vez. 676, 677. From all which it appears that the husband has an option to sue for a debt due to his wife either alone or in conjunction with her. When he sues alone the judgment when recovered enures to his separate use, and the damages in case of his death go to his executor; for by suing alone he shews his disagreement to the interest of his wife: but if he join her with himself in the action, the judgment would then survive to the wife. There are many instances in the books where a promise to pay will sustain an action although none would otherwise have been raised by implication of law; as in the case of an infant mentioned by Lord Mansfield in Cowp. 290, who may bind himself after he comes of age by a promise to pay money advanced to him before, though not for necessaries. As to the cases cited from 1 Keb. 281, 440, and All. 72, the answer is that the questions there arose on special verdicts, where the finding of the jury might negative the promise laid in the declaration. That appears certainly to have been the case in the last-mentioned report, and probably was so in the other, though that is very short and does not state the finding in detail.

Bayley, contra. There is no consideration in law to sustain the promise laid in the declaration. Without such a promise it is clear that the husband would only be liable in case of a recovery against him during the joint lives of himself and his wife in an action against them jointly. If the wife died before the action was commenced he would not be liable; neither would his executors if he died in the lifetime of his wife before judgment; but the action would survive against the wife in the latter case, and against her personal representatives in the former. The effect of this action then is to increase the liability which the law throws on the husband; for it is to make him liable though his wife died, and to make his personal representative liable though he died in the lifetime of his wife before judgment; it is therefore *nudum pactum*, and the promise is void in law. He then cited *Rann v. Hughes*¹ to shew that the promise must be co-extensive with the consideration. So here, the husband is only liable to pay this debt in right of his wife in certain events; but this is an attempt to make him liable in his own right and at all events. As to the answer attempted to be given to the cases in Keble and Alleyn, it cannot make any difference that the question arose on special verdicts; and besides, in the report in Keble reference is made to a case where the same point was determined on demurrer.

THE COURT thought that according to the best authorities on this subject the action against the husband alone could not be supported; observing that the case cited from Alleyn was a direct authority in point. And therefore they made the

Rule absolute.

¹ A note, stating the decision of the case of *Rann v. Hughes* in the House of Lords, is omitted. — ED.

HEARD AND WIFE v. STAMFORD.

1735. 3 *Peere Williams*, 409.

A FEME *sole* was indebted to her sister in £50 by note; she married, and brought a personal estate to the value of £700 to her husband, with whom she lived about a year and a quarter, and then died; the creditor by note never recovered judgment against the husband and wife, and the debt remained unpaid. The husband, on the wife's death, administered to the wife. The sister married, and with her husband brought a bill against the defendant, and finding that the *choses en action*, of which the wife died possessed, were not sufficient to pay the £50 debt, which the wife owed *dum sola*; it was prayed that the defendant the husband, for so much as he had received out of the clear personal estate of the wife upon his marriage, should be made liable to answer the plaintiff's demand.

And it was insisted to be but common reason and justice, that as the wife was the owner of a visible estate, upon the credit of which the plaintiff might have intrusted her; so he that had such estate should pay the debt, which he might well afford to do; that it would be a case full of hardship, if a *feme sole*, who in ready money, goods, jewels, terms for years, &c. might be worth £10,000 and might owe £1,000 if such woman should afterwards marry, and die, that on her death, her husband should go away with the £10,000 and not be obliged to pay one farthing of his wife's debts; this would prove of the most pernicious consequence to the creditors; whereas, on the other hand, the husband could have no reason to complain of being liable to answer their demands, as far as he had received a fortune with his wife; that the author of a book, intituled *The Office of Executors*, (a book well esteemed) chap. 17, touching a *feme covert's* being executrix, takes notice of this case as a very hard one, and indeed recommends it as proper for the consideration of a court of equity; that accordingly the court has granted relief under such circumstances, as appears from the *Chancery Reports*, 295. *Freeman v. Goodham*, where a *feme dum sola* bought goods, but did not pay for them, and afterwards married, and died, having brought a good portion, which came to the hands of her husband, who, on the creditors filing a bill against him, to be paid for the goods, demurred. The Lord Chancellor Nottingham, overruled the demurrer, saying with some earnestness, *that he would alter the law in that point*. So in the case of *Powell v. Bell*, *Abridgment of Cases in Equity*, 16. *Precedents in Chancery*, 256. It was decreed, that the wife who had contracted debts *dum sola*, being dead, the husband should account for what he had received with her, and should be so far liable to her debts; and there Mr. Vernon is said to have informed the court, that he had often known it so held.

It was moreover insisted, that one precedent relieving a creditor, was more to be regarded than three to the contrary.

LORD CHANCELLOR [TALBOT]. It is extremely clear, that by law the husband is liable to the wife's debts only during the coverture, unless the creditor recovers judgment against him in the wife's lifetime; and I do not see how any thing less than an act of Parliament can alter the law. The wife's *choses en action* are assets, and will be liable, but these, it seems, are not sufficient in the principal case to answer the demand. In the case of *Freeman v. Goodham*, there was some reason for the court to be provoked, when the goods themselves continued, after the death of the wife, in the hands of the husband, who notwithstanding refused to pay for them. It is true, it appears the then Lord Chancellor overruled the demurrer; but what was done afterwards, what decree his Lordship made, whether the cause was ever heard, or whether the bill was not dismissed, does not appear. Neither in the case of *Powell v. Bell*, is any notice taken what estate the wife had in her own right, and what as administratrix to her former husband.

If I relieve against the husband because he had sufficient with his wife wherewith to satisfy the demand in question; by the same reason, where a *feme* indebted *dum sola* afterwards marries, bringing no fortune to her husband, and judgment is recovered against the husband, after which the wife dies, by the same reason (I say) I ought to grant relief to the husband against such judgment, which yet is not in my power, consequently there can be no ground for a court of equity to interpose in the present case. If the law as it now stands be thought inconvenient, it will be a good reason for the Legislature to alter it, but till that is done, what is law at present, must take place.

The next morning the case of *The Earl of Thomond v. Earl of Suffolk*, 1 P. Wms. 470, was cited to have been adjudged by the Lord Macclesfield, wherein this was one of the very points in question; and the Lord Macclesfield, for much the same reasons as had been given by the Lord Talbot, denied to relieve a creditor of the wife *dum sola*, against the husband who survived, and on the marriage had sufficient personal estate wherewith to answer her debts. Whereupon the Lord Chancellor took notice, that although the matter now in question was inconsiderable in value, yet the case itself was of great consequence; for which reason, if the counsel for the plaintiff were dissatisfied, he would, he said, hear them again to it. But the above mentioned case of the Earl of Thomond being insisted on as in the very point, the counsel acquiesced, and did not stir the matter again.

WOODMAN v. CHAPMAN, WIDOW.

1808. 1 *Campbell*, 189.

IN this case it appeared, that the debt for which the action was brought had been contracted by the defendant before her intermarriage with her late husband. The point was taken, therefore, that his representatives alone were liable for it. But

LORD ELLENBOROUGH held that this debt, contracted by the wife before marriage, survived against her upon her husband's death; although during the coverture, in an action to recover it, he must have been joined for conformity.

The cause was afterwards referred.

Puller, for the plaintiff.

Garrow, for the defendant.

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SECTION XIV.

Liability of Husband to Support Wife, or to fulfil Post-Nuptial Contracts of Wife.

LANE v. IRONMONGER.

1844. 13 Meeson & Welsby, 368.

DEBT for goods sold and delivered.

Plea, except as to £15, never indebted; and as to that sum, payment of money into court.

At the trial, before POLLOCK, C. B., at the Middlesex Sittings after last Trinity Term, it appeared that the action was brought to recover the sum of £5,287, for various articles of millinery, viz. bonnets, feathers, lace, and ribbons, supplied by the plaintiff to the defendant's wife, during part of the year 1843. It further appeared that the defendant's wife had a separate fortune, though she and her husband were living together; and that the plaintiff, having been induced to make inquiry, was told he had £1,100 per annum. There was no evidence of any express authority given by the husband to his wife to order the articles in question. Under these circumstances, it was contended for the defendant, that, as the articles ordered by the defendant's wife were excessive in amount, and there was no evidence of any express authority given by him, the jury ought not to infer that the wife had any implied authority from her husband to order the goods; and the direction of Lord Abinger, C. B., to the jury, in the case of *Freestone v. Butcher*, 9 Car. & P. 647, was relied upon. The learned judge having read that direction to the jury, told them that he approved of and adopted it; and the jury thereupon found a verdict for the defendant.

Humphrey now moved for a new trial, on the ground of misdirection. The direction of the learned judge in this case proceeded upon the doctrine laid down by Lord Abinger, C. B., in *Freestone v. Butcher*, which, it is submitted, is not correct in law, and cannot be supported. His lordship there says, "The general rule is, that a wife cannot bind her husband by her contract, except as his agent. There are, however, cases in which a jury may infer such agency. In the cases of orders given by the wife in those departments which she has under her control, the jury may infer that the wife was the agent of her husband till the contrary appear. So, for such articles as are necessary for the wife, such as clothes, if the order is given by the wife, and she is living with her husband, and nothing appears to the contrary, the jury do right in inferring the agency; but if the order is *excessive in point of extent*, or if, when the husband has a small income, the wife gives extravagant orders, these are circumstances from which a jury would infer

Rule bel

action of Debt for £5,287 for clothes sold by H to

do wife.

that there was no agency. The tradesman who supplies the goods takes the risk; and if the bill is one of an extravagant nature, such as the husband would never have authorized, that would be *alone* sufficient to repel the inference of agency." So unqualified a doctrine cannot be maintained. [PARKE, B. It is because she is the agent of her husband that the tradesman ought to be careful not to supply her to an extravagant extent, for her giving orders to such an extent would go to shew she was not acting as the husband's agent, and to the extent authorized by him.] The case of *Freestone v. Butcher* seems to carry the law as to the husband's exemption from liability further than any of the cases which have preceded it. This is a case in which the husband and wife are living together, and it may fairly be presumed that he had seen these articles of dress worn by his wife. In *Montague v. Benedict*, 3 B. & Cr. 635, it is said that "cohabitation is presumptive evidence of the assent of the husband; but it may be rebutted by contrary evidence." In that case there was evidence to rebut the presumption, and the contract was held not to be within her authority. [POLLOCK, C. B. How can you distinguish between clothes and rings, which are both ornamental? Jewelry may be just as fit to be ordered by a lady as lace or any other article of dress. PARKE, B. The only question is, whether the extravagance of the bill is an element to be taken into consideration by the jury, in considering the question of the wife's agency. Surely it is.] It was incorrect in the learned judge to say, in the words of Lord Abinger's ruling, that the extravagance of the bill "would be *alone* sufficient to repel the inference of agency."

PARKE, B. There may be a trifling inaccuracy in the report of the case of *Freestone v. Butcher*, in stating that the extravagance of the bill would *alone* repel the inference of agency; that alone, perhaps, would not be sufficient; but it may be repelled by that and other circumstances together. The law as there laid down is substantially correct. The whole turns upon the question of the husband's authority; and it is for the jury to say whether the wife had any such authority, and whether the plaintiff, who supplied her with these articles, must not have known that she was exceeding her husband's authority to pledge his credit. If he had any doubts upon the subject, he might have made inquiries of the husband. It was not proved that the husband knew the articles had been ordered, or saw his wife wearing them.

POLLOCK, C. B., and GURNEY, B., concurred.

Rule refused.

J.A.

ANTHONY v. PHILLIPS.

1890. 17 *Rhode Island*, 188.

DEFENDANT'S petition for a new trial.

December 10, 1890. STINESS, J. The plaintiffs sold and delivered the furniture sued for to the defendant's wife upon her order, and charged the bill to the defendant. They had previously made similar sales upon her order, and the defendant had paid the bills without objection. Upon one occasion the defendant had accompanied his wife to the plaintiffs' store, when a bill of goods were purchased, but at other times she was alone. At the time of the last sale the defendant and his wife had separated, and these goods were sent to the house where the wife was living apart from her husband, having left him, so far as appears, without justifiable cause. The plaintiffs did not know of the separation. The defendant requested the court below to instruct the jury as follows: "If the husband provided a suitable home according to his means for his wife, and she voluntarily left the same, without fault on his part, he was not liable for debts contracted by her while living apart from her husband, by reason of his being her husband, even though he had paid for goods ordered by his wife and delivered at their home while living together, whether the persons dealing with her had notice of the separation or not."

The court instructed the jury that if a woman lives apart from her husband by her own wrong, the husband is discharged from supporting her; but when a tradesman furnishes goods to a wife after separation, the husband having previously paid for goods furnished to her, the tradesman not knowing of the separation, and not having reasonable cause to know it, the agency may be presumed to continue until knowledge is brought home to the tradesman. Exception was taken to this instruction. We think the instruction as given was correct. A married woman may bind her husband for goods bought by her in two ways: for necessities by reason of his obligation to support her, when he omits or refuses to provide them under circumstances which make it his duty so to do; and for other things when she acts as his agent, under his authority, express or implied. In the former case she may bind him without, or even against, his personal authority, by what is termed her agency in law; in the latter case she can bind him only in the way that any person may bind another, by an agency in fact. The request made in this case related only to the marital obligation, and instruction was given substantially as requested. If the husband provided a suitable home for his wife which she voluntarily left, without fault on his part, it is clear that he would not be liable for goods furnished to her while away by reason of the fact of marriage. *Debenham v. Mellon*, L. R. 6 App. Cas. 24. The portion of the instruction excepted to covered the liability of the husband by reason of the agency of the

wife. The only question in this case, therefore, is, whether the plaintiffs might presume that the agency, evidenced by previous dealing, continued until they knew, or had reason to know, of the separation, or of a revocation of the agency. This question relates to the law of agency rather than to the relation of husband and wife. The liability of the husband in case of such agency was settled in the case of *Munby v. Scott*, 1 Sid. 109, by the third resolution agreed to by the judges, p. 120; 2 Smith Lead. Cas. Hare & Wallace, notes, *418, as follows: "III. If the wife purchase goods, and the husband, by any act precedent or subsequent, ratifies the contract by his assent, the husband shall be liable upon it; if not on his *assumpsit* in law, yet on his *assumpsit* in fact, whether the goods are for himself, or for his children, or for his family, all which positions are so obvious that they require no demonstration."

If, then, the husband has held the wife out as his agent, by previous dealings, the person has the right to presume that the authority continues, until he has reason to know to the contrary. This is the well-established rule in cases of agency. See Story on Agency, § 470, and note. Amer. & Eng. Cyclopædia of Law, 448, and cases cited. A familiar illustration of this rule is found in the case of a retiring partner. This was the substance of the instruction given to the jury, and it was therefore correct. *Mickelberry v. Harvey*, 58 Ind. 523; *McGeorge v. Egan*, 5 Bing. N. C. 196; *Reid v. Teakle*, 13 C. B. 627; *Benjamin v. Benjamin*, 15 Conn. 347; *Cany v. Patton*, 2 Ashm. 140. *Petition dismissed.*

Dexter B. Potter, for plaintiff.

Ambrose E. West, for defendant.

DEBENHAM v. MELLON.

1880. *Law Reports*, 6 *Appeal Cases*, 24.¹

IN the House of Lords.

Appeal against a decision of the Court of Appeal which had affirmed a judgment of the Queen's Bench Division upon a ruling of MR. JUSTICE BOWEN.

The appellants brought an action against the defendant for the price of goods supplied to his wife. The statement of claim described the goods as sold and delivered to the defendant, ordered for him by his wife as his duly authorized agent in that behalf.

The defence denied that the goods were ordered by the defendant's wife as his agent, alleged that his wife was not his agent in that behalf, and had no authority express or implied to pledge his credit for

¹ The opinion of THESIGER, L. J., in the lower court, has been inserted here before the decision in the House of Lords. The arguments are omitted.—ED.

the goods, as the plaintiffs knew or ought to have known. Issue thereon.

The cause was tried in London before MR. JUSTICE BOWEN and a jury. The plaintiffs were drapers in London — the goods were admitted to be necessities suitable for the condition of the wife, and the prices were admitted to be reasonable. It appeared from the evidence offered by the defendant, that, by an arrangement between the husband and wife he was to furnish her with £52 a year (on some occasions increased to £62) with which she was to supply herself and their children with clothes, and that he had positively forbidden her to exceed that allowance. The husband and wife were employed as manager and manageress of the hotel of a (limited) company, first in Devonshire and then at Bradford. They lived together in the ordinary way. The question left by the judge to the jury was whether at the time when the goods were ordered, the defendant had withdrawn from his wife authority to pledge his credit, and had forbidden her to do so. This question was answered in the affirmative, whereupon judgment was ordered to be entered for the defendant. The Queen's Bench Division refused a new trial.

The plaintiffs appealed, and the case was heard before LORDS JUSTICES BRAMWELL, BAGGALLAY, and THESIGER, who, following and adopting the decision in *Jolly v. Rees*, 15 C. B. (N. S.) 628; 33 L. J. (C. P.) 177, affirmed the ruling in the court below. [L. R. 5 Q. B. Div. 394.]

The opinion of THESIGER, L. J., reported in L. R. 5 Q. B. Div. p. 401-404, was as follows: —

THESIGER, L. J. The state of facts upon which the judgment of the court is to proceed I take to be as follows: a husband and wife living together: the husband able and willing to supply the wife with necessities, or the means of obtaining them: an agreement between them, not made public in any way, that the wife shall not pledge her husband's credit: a tradesman, without notice of that agreement, and without having had any previous dealings with the wife with the husband's assent, supplying her, upon the credit of the husband, but without his knowledge or assent, with articles of female attire suitable to her station in life: an action brought against the husband for the price of such articles.

The question for us is whether the action is maintainable. I agree with the other members of the court, and with BOWEN, J., that it is not. The appellants' counsel have brought under our notice a considerable number of authorities with the view of establishing that the law as laid down in *Jolly v. Rees*, 15 C. B. (N. S.) 628; 33 L. J. (C. P.) 177, is erroneous. I think that the authorities have a contrary effect. They establish beyond controversy that the liability of a husband for debts incurred by his wife during cohabitation is based in the main upon the ordinary principles of agency. It follows that he is

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20 aff.

only liable when he has expressly or impliedly, by prior mandate or subsequent ratification, authorized her to pledge his credit or has so conducted himself as to make it inequitable for him to deny, or to estop him from denying, her authority. In the present case express authority is out of the question, and there is no evidence that the defendant ever assented in any way to the act of his wife in pledging his credit to the plaintiffs.

But it is said that there is a presumption that a wife living with her husband is authorized to pledge her husband's credit for necessities; that the goods supplied by the plaintiffs were, as it is admitted they were, necessities; and that, as a consequence, an implied authority is established. This contention is founded upon an erroneous view of what is meant by the term "presumption" in cases where it has been used with reference to a wife's authority to pledge her husband's credit for necessities. There is a presumption that she has such authority in the sense that a tradesman supplying her with necessities upon her husband's credit and suing him, makes out a *prima facie* case against him, upon proof of that fact and of the cohabitation. But this is a mere presumption of fact founded upon the supposition that wives cohabiting with their husbands ordinarily have authority to manage in their own way certain departments of the household expenditure, and to pledge their husbands' credit in respect of matters coming within those departments. Such a presumption or *prima facie* case is rebuttable, and is rebutted when it is proved in the particular case, as here, that the wife has not that authority. If this were not so, the principles of agency, upon which, *ex hypothesi*, the liability of the husband is founded, would be practically of no effect.

Feeling this difficulty the appellants' counsel shift their ground, and contend that, although under the circumstances of this case the wife may have had no authority in fact or in law to pledge her husband's credit, yet the defendant must be taken to have held out his wife as having authority to pledge his credit to all persons supplying her with necessities without notice that she had not authority in fact, and consequently is estopped as between him and the plaintiffs from denying her authority.

This contention appears to me to have no better ground of support than the one with which I have just dealt. If a tradesman has had dealings with the wife upon the credit of the husband, and the husband has paid him without demur in respect of such dealings, the tradesman has a right to assume, in the absence of notice to the contrary, that the authority of the wife which the husband has recognized continues. The husband's quiescence is in such cases tantamount to acquiescence, and forbids his denying an authority which his own conduct has invited the tradesman to assume; just as it would forbid his denying the authority of a servant who had been in the habit of ordering goods for him from the tradesman, and whose authority he had secretly revoked. But what, in the case of a tradesman dealing with

his wife without his knowledge or assent, has the husband done or omitted to do, which renders it inequitable for him to deny his wife's authority? For the tradesman it is said that the mere relationship of husband and wife entitles him to assume, in the absence of notice to the contrary, that the wife has authority to pledge her husband's credit for necessaries. But this is a fallacy. The tradesman must be taken to know the law; he knows (for the present argument proceeds upon that supposition) that the wife has no authority in fact or in law to pledge the husband's credit even for necessaries, unless he expressly or impliedly gives it her, and that what the husband gives he may take away. How, then, can the tradesman dealing with the wife, without any communication with or knowledge on the part of the husband, say that he is induced or invited by the husband to deal with the wife upon the faith and in the belief of her being in fact authorized to pledge her husband's credit? If he be so induced or invited, it can only be upon the footing of the law making a husband absolutely liable for necessaries purchased by his wife to any person dealing with her, although for the first time, without notice that her authority is limited; but if the law does so make him liable, there is no need for any estoppel, and we are driven back upon the exploded notion that the husband's liability is founded entirely upon some law other than that which governs in general the relations of principal and agent.

It is urged that it is hard to throw upon a tradesman the burden of inquiring into the fact of a wife's authority to buy necessaries upon her husband's credit. I assent to the answer that while the tradesman has at least the power to inquire or to forbear from giving credit, it is still harder, and is contrary if not to public policy yet to general principles of justice, to cast upon a husband the burden of debts which he has no power to control at all except by a public advertisement that his wife is not to be trusted, and in respect to which even after such advertisement he may be made liable to a tradesman who is able to swear that he never saw it.

It appears to me that the decision of the majority of the judges in the case of *Jolly v. Rees*, 15 C. B. (N. S.) 628, 33 L. J. (C. P.) 177, has put the law as regards this matter upon a proper footing, and that there is no ground for disturbing the judgment in this case which the defendant has obtained.

After the decision in the Court of Appeals, the present appeal to the House of Lords was brought.

Benjamin, Q. C., and *A. L. Smith*, for appellants.

Willis, Q. C., and *R. A. McCall*, for respondent.

LORD CHANCELLOR SELBORNE. My Lords, you are asked in this case to review the decision of the Court of Common Pleas in 1864, in *Jolly v. Rees*, 15 C. B. (N. S.) 628; 33 L. J. (C. P.) 177, the correctness of which, as far as I know, has not been seriously controverted since that time.

The point determined was one of much importance; namely, that the question, whether a wife has authority to pledge her husband's credit, is to be treated as one of fact, upon the circumstances of each particular case, whatever may be the presumption arising from any particular state of circumstances.

That principle is now controverted; and the first question before your Lordships is, whether the mere fact of marriage implies a mandate by law, making the wife (who cannot herself contract, unless so far as she may have separate estate) the agent in law of her husband, to bind him, and to pledge his credit, by what otherwise would have been her own contract, if she had been a *feme sole*? On that point, I think it enough to say, that, according to all the authorities, there is no such mandate in law from the fact of marriage only, except in the particular case of necessity; a necessity which may arise, when the husband has deserted the wife, or has by his conduct compelled her to live apart from him, without properly providing for her, — but not when the husband and wife are living together, and when the wife is properly maintained; because there is, in that state of circumstances, no *primâ facie* evidence that the husband is neglecting to discharge his necessary duty, or that there is any necessary occasion for the wife to run him into debt, for the purpose of keeping herself alive, or supplying herself with lodging or clothing.

I therefore lay aside that proposition; and, thinking it clear, that there is no mandate in law by the mere fact of marriage applicable to such a state of circumstances as we have at present to consider, I pass to the next question; whether the law implies a mandate to the wife, from the fact, not of marriage, but of cohabitation? If it does, on what principle? Cohabitation is not (like marriage), a *status*, or a new contract; it is a general expression for a certain condition of facts. If, therefore, the law did imply any such mandate from cohabitation, it must be as an implication of fact, and not as a conclusion of law. There are, no doubt, various authorities, which shew that the ordinary state of cohabitation between husband and wife does carry with it some presumption, some *primâ facie* evidence, of an authority to do those things, which, in such ordinary circumstances of cohabitation, it is usual for a wife to do. Mr. Benjamin says, that those words are not the best which might be used for the purpose; but that “apparent authority,” or “ostensible authority,” would be better. I am not at all sure that Mr. Benjamin's words may not be very good words, for that ordinary state of circumstances, in the case of cohabitation between husband and wife, out of which the ordinary presumption arises; because, in that state of circumstances, the husband may truly be said to do acts, or habitually to consent to acts, which hold the wife out as his agent for certain purposes. Then, the word “apparent,” or the word “ostensible,” becomes appropriate. But where there has been nothing done, nothing consented to, by the husband, to justify the proposition that he has ever held out the wife as his agent, I apprehend

that the question whether, as a matter of fact, he has given the wife authority, must be examined upon the whole circumstances of the case. No doubt, though not intending to hold her out as his agent, and though she may not actually have had authority, the husband may have so conducted himself as to entitle a tradesman dealing with her to rely upon some appearance of authority for which the husband ought to be held responsible. If he has so acted he may be bound; but the question must be examined as one of fact, and all the authorities, as I understand them, practically treat it so when they speak of this as a presumption *prima facie*, and not absolute; not a presumption of law, but one capable of being rebutted. When Chief Baron Pollock, in *Johnston v. Sumner*, 3 H. & N. at p. 268, said, that all the usual authorities of a wife under those circumstances might be assumed, "notwithstanding any private arrangement," I suppose him to have had in view that state of facts, under cohabitation, when a wife is managing her husband's house and establishment, which usually raises the presumption. If an appearance of authority is once, in fact, created by the husband's acts, or by his assent to the acts of his wife, it may be right to hold, that, as between the husband and a person relying upon that appearance of authority, it cannot be got rid of by a mere private understanding or agreement between the husband and wife. The same learned judge in another case which was cited during the argument, viz., *Renoux v. Teakle*, 8 Ex. at p. 682, said, that the case of the wife, in principle at all events, was not different from that of anybody else at the head of an establishment. If there is an establishment of which there is a domestic manager, although the wife may be the most natural domestic manager, and though the presumption may be strongest when she is so, yet the same presumption may, and often does, arise from similar facts, when the actual manager is not a wife, but merely a woman living with a man, and passing as his companion, with or without the assumption of the name of wife. It is also the same when the person to whom the domestic management is delegated is a housekeeper or a steward, or any other kind of superior servant. Therefore it is, in all these cases, really a mere question of fact.

Now, my Lords, in the present case, that ordinary state of circumstances which usually accompanies cohabitation where there is a house and an establishment, is entirely wanting. There was here no house, no establishment; none of those things was done, in the way of living upon credit, to provide for the ordinary and daily wants of a family or an establishment, which commonly raise the presumption. The husband and wife were both servants of a company of hotel keepers at Bradford. They lived in the hotel, which belonged to their employers; their whole board and lodging (which I take, upon the evidence, to have included that of their children) being found for them by the company; and therefore there was, in point of fact, no domestic management at all. The credit, such as it was, was given by a London

tradesman to a woman living in Bradford in these circumstances. No single act is shewn to have been done by him upon the faith of any appearance of authority in the wife; he made out all the bills to the wife in her own name. This, no doubt, would not have prevented him from recovering against the husband, if the husband was otherwise liable, but it certainly does not tend to shew that he supposed he was giving credit to the husband; much less that he was misled into doing so by any conduct of the husband. That the husband never knew any of these things is perfectly clear. The necessary conclusion of fact is, that the husband did not hold out his wife as having any authority, by any act, or by any course of conduct, either to the plaintiff or to any other persons, of whose dealings the plaintiff might be presumed to have cognizance.

Then, if the plaintiff can recover at all, it can only be because there was, notwithstanding this state of things, an actual authority in point of fact. But the evidence conclusively shews, that there was no such authority. It is said, that, when this married pair lived, four or five years before the beginning of the dealings between the wife and the plaintiffs (much more than that time before this particular debt was contracted), at Westward-Ho in Devonshire, there were some other people who did give credit to the husband, the wife then acting as his agent. That the plaintiff ever heard of that is not so much as suggested. More than four years before any dealings with the plaintiff began that state of things, being disapproved of by the husband, was put an end to. The husband at that time expressly determined and revoked any authority, which he might previously have given to the wife; and he afterwards, at the time when this debt was contracted, was making her an annual allowance more than sufficient for any necessary purposes of her clothing, according to the state of their circumstances and condition in life. It is said that of that revocation the plaintiff had no notice; but the plaintiff had no notice of the circumstances which made the revocation necessary, he never had notice of any single fact material to the question of authority, except that she was a married woman.

It was argued that, because these articles were found to be in some sense "necessaries" in their nature, the husband ought therefore to be bound. But, even if the husband and wife had been living apart, the husband would not be bound by reason of such things being necessaries if he made a reasonable allowance to his wife and duly paid it: much less can he be bound in a case like this where they were not living apart, and when he made her an allowance sufficient to cover all proper expenditure for her own and her children's clothing.

These observations dispose of the whole case; but I must add, without going into the authorities, that if the principles which run through them from first to last are regarded (as they ought to be) rather than casual *dicta* coloured (as they necessarily must be) by the circumstances of particular cases, the whole of those authorities are really

consistent with each other, and with the decision which was arrived at by the majority of the court of Common Pleas in the case of *Jolly v. Rees*, 15 C. B. (N. S.) 628; 33 L. J. (C. P.) 177.

Therefore, my Lords, I move your Lordships that this appeal be dismissed, and the judgment of the court below affirmed.

[The concurring opinions of LORD BLACKBURN and LORD WATSON are omitted.]

Order appealed from affirmed, and appeal dismissed with costs.

BOLTON v. PRENTICE.

18 George II. 2 Strange, 1214.

IN *assumpsit* for goods sold and delivered to the defendant's wife, the case appeared to be, that the defendant and his wife had formerly lodged at the plaintiff's house, and the plaintiff furnished her with goods; and the defendant finding the plaintiff had helped her to pawn her watch, and suspecting he confederated with her, left the lodgings, after paying the plaintiff his bill, and forbidding him ever trusting her again.

After this the defendant and his wife cohabited together for a year, when without any cause appearing he left her, locked up her cloaths, and upon her finding him out, refused to admit her, and struck her, and declared he would not maintain her, or pay any body that did. In this distress she borrowed cloaths of her friends, and applied to the plaintiff, who furnished her with necessaries according to the defendant's degree; which the defendant refusing to pay for, this action was brought; and upon trial the jury found for the plaintiff.

Upon motion for a new trial, the court held the verdict was right; for whilst they were at the plaintiff's, there was a particular reason for the particular prohibition; yet the causeless turning her away destitute afterwards, gave her the general credit again: and if a husband should be allowed, under the notion of a particular prohibition, to destroy her obtaining credit in one place, he may in the same manner prevent it with all people she is acquainted with. He appears to be a wrong-doer, and therefore has no right to prohibit any body. They distinguished this case from the case of *Manby v. Scott*, 1 Sid. 109, for there the wife was guilty of the first wrong in eloping.

VUSLER v. COX.

1891. 53 *New Jersey Law*, 516.

ON *certiorari* to Warren Pleas to review a judgment of that court upon the trial of an appeal from a justice's court.

This suit was brought by Dr. Henry M. Cox, a physician, against the executors of George Vusler, deceased, to recover a bill for medical services rendered to the testator's wife between March 27th, 1883, and October 2d of the same year. The testator died in May, 1886. The court certified that prior to May, 1880, the testator and his wife lived together for five or six years; that on or about the 5th of May the testator's wife, in his absence, moved away from his house and left him, and went to her brother's house, a few miles away; that she removed from her husband's house everything that belonged to her; that when she took away the last load of goods she told her husband that she was going to leave and was not coming back again; that the testator, after his wife left, lived with his sons until his death; that his wife never returned to him, but continued to reside at her brother's house, and that it was during her illness at her brother's house that the plaintiff rendered the professional services sued for.

The court further certified that it did not appear that the wife had any reason for leaving her husband, and that it did not appear that the plaintiff had any knowledge that the testator's wife was not living with him—the doctor denying that he knew anything about it.

Argued at February Term, 1891, before JUSTICES DEPUE, VAN SYCKEL, and SCUDDER.

For the plaintiff in *certiorari*, *George M. Shipman*.

Contra, *Henry S. Harris*.

The opinion of the court was delivered by

DEPUE, J. It may be inferred from the case certified, and will be assumed, that the plaintiff rendered these services to the testator's wife without knowledge that she was living in a state of separation from her husband.

The liability of a husband on a contract made by the wife is usually ascribed to those principles which are applicable to the relation of principal and agent.

Where husband and wife are living together, the wife has implied authority to pledge her husband's credit for such things as fall within the domestic department ordinarily confided to her management, and for articles furnished to her for her personal use suitable to the style in which the husband chooses to live. Under such circumstances the presumption is in favor of the wife's authority to contract on behalf of her husband. 1 Ev. Pr. & A. 166; *Wilson v. Herbert*, 12 Vroom, 454; *Jolly v. Rees*, 15 C. B., N. S., 628; Notes to *Manby v. Scott*, 3 Sm. Lead. Cas. (9th ed.), 1757.

But where the husband and wife are living in a state of separation, the presumption is against the authority of the wife to bind the husband by her contract. Under such circumstances the general rule is that the husband is not liable. To this rule there are two exceptions pertinent to this inquiry, the first of which is where husband and wife separate and live in a state of separation by mutual consent, without any provision for her maintenance or means of her own for her support; the other, where the wife leaves her husband under the stress of his misconduct of such a character as in law is regarded as a justifiable cause for the wife's quitting her husband's society. In such cases, the presumption being against the liability of the husband for the wife's contract, the burden of proof is upon the party seeking to enforce against him a liability for her contract. He must show affirmatively the special circumstances which shall fix the responsibility on the husband in order to establish his cause of action. *Mainwaring v. Leslie*, 1 Moo. & M. 18; *Johnston v. Sumner*, 3 Hurlst. & N. 261, 268; *Blowers v. Sturtevant*, 4 Den. 46; *Breinig v. Meitzler*, 23 Penna. St. 156; *Snover v. Blair*, 1 Dutcher, 94; 2 Kent, 147. The cases, English and American, on this subject, are collected in the American editions of Smith's Leading Cases, under the head of *Manby v. Scott*. 2 wce

The certificate of the Court of Common Pleas states that it did not appear that the wife had any reason for leaving her husband, and the facts set out in the certificate tend to show that she left of her own volition, and without any justifiable cause.

Nor will the fact that the plaintiff had no knowledge that the wife was living separate from her husband avail to relieve the plaintiff from the burden of proof. Independently of agency, express or implied from cohabitation, the liability of the husband upon contracts made by the wife pledging his credit arises from the acts or misconduct of the husband. As was said by Lord Selborne, there is no mandate in law from the fact of marriage only, making the wife the agent in law of her husband to bind him and pledge his credit, except in the particular case of necessity—a necessity which may arise where the husband has deserted the wife, or has by his conduct compelled her to live apart from him. *Debenham v. Mellon*, 6 App. Cas. 24, 31. On any other hypothesis a wife living separate from her husband without justifiable cause, or even through her own misconduct, would have it in her power to pledge his credit by seeking persons with whom to deal who were unaware of the family relations.

There being no proof of facts from which agency might be implied, and from the fact that the wife was living apart from her husband, the presumption being that she had no authority to bind the husband, the plaintiff could make no case against the husband except on proof of those particular circumstances from which the husband's liability would result as a mandate in law. To make out a cause of action against the husband, the plaintiff was bound to prove those special circumstances from which alone the husband's liability for the plaintiff's demands would result. Without such proof he had no case.

Upon the case as certified the Court of Common Pleas gave judgment for the plaintiff. That judgment was erroneous, and should be reversed.

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EASTLAND v. BURCHELL.

1878. *Law Reports*, 3 *Queen's Bench Division*, 432.¹

APPEAL from the Tonbridge County Court upon a case stated for the opinion of the Queen's Bench Division.

Watkin Williams, Q. C., for defendant.

D. Kingsford, for plaintiff.

The judgment of the court (MELLOR and LUSH, JJ.) was delivered by LUSH, J. The questions arising in this appeal are: 1st, whether the defendant is liable for butcher's meat supplied to his wife between the 13th of March and the 3rd of October, 1877, under the circumstances stated in the case; and, 2ndly, whether the county court judge was right in excluding the evidence of his solicitor, who tendered himself to prove from his personal knowledge what the exact income of the defendant was; the ground of rejection being, that the solicitor was acting as advocate for him in the cause, and that he could only give hearsay evidence.

The defendant and his wife were married in 1850. On the 6th of January, 1876, they separated by mutual consent, the defendant taking charge of the four elder children, the three younger ones remaining with his wife. By their marriage settlement all the property then belonging to the wife, together with the property which would come to her on the death of her mother, was settled to her separate use. A deed of separation was executed, by which she was to take and enjoy all articles of personal ornament and dress, and all property and income to which she then was, or should thereafter become possessed or entitled, and the savings of all income. The defendant covenanted to pay to the trustee £5 a quarter so long as the three children, or any of them, should be under the age of twenty-one years, and continued to reside with her. The wife covenanted that she would maintain and educate the children out of her separate income and the £5 per quarter, and not apply to the defendant for any further pecuniary assistance, and the trustee covenanted to indemnify him from all debts and liabilities thereafter to be contracted by the wife.

The parties continued to live separate under this arrangement, and the defendant had paid the £5 per quarter up to a period subsequent to the accruing of the debt in question.

The plaintiff had never known the defendant, and had only dealt with the wife subsequently to the deed of separation. He supplied the goods

¹ Statement and arguments omitted. — Ed.

supposing her to be a married woman, but without making any inquiries in the matter. The only evidence on which the learned judge acted was that of the wife (it being admitted that the goods had been supplied), and she stated that she had been ever since the separation, in receipt of her separate income, which brought in £297 15s. 2d. per annum, and the £20 a year paid by the defendant; and that she found such income insufficient to enable her to maintain herself and such of her children as resided with her, and to educate them. The case states that she also gave evidence as to the position and income of the defendant prior to her separation, but does not state what that position and income were.

The learned judge decided upon this evidence, that the income of the wife was insufficient for the maintenance and education of herself and the children under her care, and thereupon held as a matter of law, that she had authority to pledge her husband's credit, and did pledge it to the plaintiff in respect of the meat supplied her.

We are of opinion that this ruling is erroneous. The authority of a wife to pledge the credit of her husband is a delegated, not an inherent, authority. If she binds him, she binds him only as his agent. This is a well established doctrine. If she leaves him without cause and without consent, she carries no implied authority with her, to maintain herself at his expense. But if he wrongfully compels her to leave his home, he is bound to maintain her elsewhere, and if he makes no adequate provision for this purpose, she becomes an agent of necessity to supply her wants upon his credit. In such a case, inasmuch as she is entitled to a provision suitable to her husband's means and position, the sufficiency of any allowance which he makes under these circumstances, is necessarily a question for the jury. Where, however, the parties separate by mutual consent, they may make their own terms; and so long as they continue the separation, these terms are binding on both. Where the terms are, as in this case, that the wife shall receive a specified income for her maintenance, and shall not apply to the husband for anything more, how can any authority to claim more be implied? It is excluded by the express term of the arrangement. It is obviously immaterial whether the income is derived from the wife's separate property or from the allowance of the husband, or partly from one source and partly from the other. It is enough that she has a provision which she agrees to accept as sufficient. She cannot avail herself of her husband's consent to the separation, which alone justifies her in living apart from him, and repudiate the conditions upon which that consent was given. And it seems superfluous to add, that no third person can claim to disturb the arrangement made between the husband and the wife, and to say that he will, by supplying goods to the wife on credit, compel the husband to pay more than the wife could have claimed, that is, the stipulated allowance. He can derive no authority from the wife which she is incompetent to give. We are therefore of opinion that any inquiry into the husband's means was irrelevant, and for that rea-

son we abstain from saying more upon the second question than that, if evidence upon that point had been relevant, we see no reason why the evidence should be rejected.

We do not think it necessary to go through the various cases cited. They are no guide to us except so far as they exhibit the principle on which the authority of a wife to pledge the credit of her husband rests. Upon that point they are conclusive to shew that the capacity of a wife to contract debts upon the credit of her husband is derived from an authority either expressly or impliedly given by him.

We need only refer to the two more recent cases of *Johnston v. Sumner*, 3 H. & N. 261; 27 L. J. (Ex.) 341, and *Biffin v. Bignell*, 7 H. & N. 877; 31 L. J. (Ex.) 189.

We are not concerned to inquire whether in this or that particular case this principle has been rightly applied. We have only to deal with the facts of this case, and applying the principle to them, we hold that the defendant is not liable for the debt contracted with the plaintiff.

Being satisfied that we have all the materials before us necessary for the determination of the question, it would be a useless expense to the parties to send the case back for a new trial.

We therefore act upon the wholesome provision of the Judicature Act, 1875, Order XL., Rule 10, and direct that the judgment for the plaintiff below, be set aside, and judgment be entered for the defendant.

Judgment for the defendant.

HUNT v. HAYES.

1891. 64 *Vermont*, 89.¹

GENERAL assumpsit. Plea, the general issue. Trial by jury at the December Term, 1889, Windsor County, TART, J., presiding.

The plaintiff was the father of the defendant's wife, and brought this suit to recover for necessities furnished in the support of his daughter and her infant son who were residing in the plaintiff's family. It was conceded by the defendant that the items sued for were necessities, and that the wife was living apart from her husband under such circumstances as would justify her in pledging his credit for necessities, unless she was prevented from doing so by the fact that she had other means of support; and the defendant introduced evidence of an ante-nuptial agreement by which it was provided that he would pay to his wife the sum of \$2,000 annually. The plaintiff upon his part conceded that the \$2,000 had been regularly paid, but contended that the defendant was liable for the support of his wife and infant son notwithstanding.

The court ruled that the defendant was liable to the same extent and

¹ Arguments omitted. — Ed.

In the same manner as though no ante-nuptial agreement had been made, to which the defendant excepted.

Inasmuch as both parties desired a determination of this question before a trial was had upon the merits of the case, the case was withdrawn from the jury, and the defendant's exceptions certified to the Supreme Court.

The child referred to was a son of the defendant, born June 7, 1888, who had lived at the plaintiff's house with his mother.

Gilbert A. Davis and Dillingham & Huse, for the plaintiff.

William Batchelder and William E. Johnson, for the defendant.

ROWELL, D. The authority of a wife to pledge the credit of her husband for necessities is usually regarded as a delegated authority and not as an inherent authority; and it is considered that if she binds him at all in this behalf she binds him only as his agent. But this authority or agency may be a presumption of law as well as an inference of fact; and it must be a presumption of law when an agency in fact, express or implied, is either not proved or is expressly disproved, as is often the case. Thus, in *Harrison v. Grady*, 13 L. T., N. S. 369, it is said that when a wife is turned out of her home without the means of obtaining necessities, it is an irrebuttable presumption of law that she has her husband's authority to pledge his credit for necessities; but that when husband and wife are cohabiting, it is a presumption of fact that she is his agent for ordering articles supplied to their establishment that are suitable to the station that he allows her to assume, but that if they are not suitable to that station, a presumption arises that she was not his agent to pledge his credit for them. So in *Read v. Legard*, 6 Exch. 636, where a husband was made liable for necessities supplied to his wife during the period of his lunacy, Baron Alderson says: "If a wife is compelled by her husband's misconduct to procure necessities for herself, as, for instance, if he drives her away from his house, or brings improper persons into it, so that no respectable woman could live there, then, according to the adjudged cases, he gives her authority to pledge his credit for her necessary maintenance elsewhere, which means that the law gives her authority by force of the relation of husband and wife." Baron Martin said that this is the true foundation of the liability, namely, that by contracting the relation of marriage, a husband takes upon himself the duty of supplying his wife with necessities, and that if he does not perform that duty, either through his own fault or in consequence of a misfortune of the kind in that case, the wife has, by reason of the relation, an authority to procure them herself, and that the husband is responsible for what is so supplied.

This doctrine is pretty satisfactory; but we should be quite as well satisfied to say that in such cases the law treats the husband just as though he had in fact given the wife authority; the same as in the case of an implied promise, where the law does not really go upon the ground of a promise, but treats the party just as though he had promised; and that is what is meant by an implied promise.

That a wife, wrongfully turned away by her husband without the means of supplying herself with necessaries, may pledge his credit for them, is undeniable. But the question we have to consider is, whether, when thus turned away, she can pledge her husband's credit for necessaries when she has an adequate income of her own with which she can supply herself.

The earliest case we have found on this question is *Warr v. Huntley*, 1 Salk. 118, which is this: An ordinary working man married a woman of like condition, and after cohabiting for some time the husband left her, and during his absence the wife worked, and this action being brought for her diet, it was held by Lord Holt that the money she earned should go to keep her. The principle of this case is recognized in *Johnston v. Sumner*, 3 H. & N. 261, though the case itself is not referred to. Pollock, C. B., there says: "If the husband turns his wife away, it is not unreasonable to say she has an authority of necessity; for by law she has no property, and may not be able to earn her living: but we should hesitate to say, if a laboring man turned his wife away, she being capable of earning and earning as much as he did, or if a man turned his wife away, she having a settlement double his income in amount, — that in such cases the wife could bind the husband." But a precarious income is not enough. Thus, in *Thompson v. Hervey*, 4 Burr. 2177, the wife, who had been sent adrift, had a pension of £300 a year from the Crown, granted to her in her own name, but determinable at the pleasure of the Crown; and it was held that she could pledge the husband's credit notwithstanding, for that the pension, being only a voluntary grace and bounty and only during the pleasure of the Crown, was not what any creditor of hers could be supposed to give her credit upon.

Lidallow v. Wilmot, 2 Stark. 86, is much relied upon by the defendant and strongly denied to be in point by the plaintiff. But we think it in point. The original cause of the separation, which took place thirty years before suit brought, did not appear, but a reason for its continuance did appear, for the defendant had long cohabited with another woman, by whom he had a daughter twenty-five years old, consequently the wife was necessarily away: and this is what is said of the case in *Johnston v. Sumner*. So it was not a case of separation by mutual consent, as clearly appears by what was said in summing up. The wife had adequate means of her own, but it does not appear whence she derived them, much less that she derived them from her husband by way of an allowance on separation, as is claimed in argument to be the fair inference from the facts stated. Nor is there anything to show that the wife had forfeited her conjugal rights. Lord Ellenborough, in summing up, said: "The first question for consideration is, whether the defendant turned his wife out of doors, or by the indecency of his conduct precluded her from living with him, for then he was bound by law to afford her means of support adequate to her situation; but if either from her husband or from other sources she was possessed of such means,

the law gives no remedy against the husband, but the idea of an implied credit is repelled." And this is undoubtedly the law of England. Blackburn, J., in *Bazeley v. Forder*, 9 B. & S. 599, puts it thus: "A wife when separated from her husband in consequence of misconduct on his part rendering it improper for her to remain with him, is in the same position as if he turned her out of doors, and is by law clothed with power to pledge his credit for her reasonable expenses according to her husband's degree, *unless she is in some other way supplied* with the means of providing them." In this connection it is worthy of remark, if the husband's liability when he turns his wife away is put upon the ground of agency arising from necessity, as many of the cases do put it, — *Eastland v. Burchell*, L. R. 3 Q. B. D. 432, — it logically follows that when there is no necessity there can be no agency, for *cessante ratione legis cessat ipsa lex*; and there can be no necessity when the wife has means of her own with which she can supply herself.

Clifford v. Luton, 3 C. & P. 15, is understood by some to be to the same effect as *Liddlow v. Wilmot*. Mr. Smith so regards it in his 2 Lead. Cas. 438. It is so digested in 4 Jacob's Fisher's Dig. pl. 6041. And in *Johnston v. Sumner*, Pollock, C. B., cites it in connection with *Liddlow v. Wilmot*, and to the same proposition. And it is quite susceptible of the construction they give it, although it must be admitted that as the case is reported in Carrington & Payne, that point does not very clearly appear.

In *Litson v. Brown*, 26 Ind. 489, it is held that if a wife, living apart from her husband for just cause, has means of her own with which she can support herself, however derived, no necessity exists for others to supply her, and that the husband cannot be made liable except on an express promise to pay. Mr. Schouler, in his work on Husband and Wife, s. 117, seems to recognize this case as law, for he cites it in support of the proposition that when a husband by his misconduct compels his wife to live apart from him, he is liable for her necessities notwithstanding his allowance, as long as that allowance is insufficient *and she has no proper means of support*. And we do not think that he elsewhere in his work controverts this doctrine. True, he says that antenuptial settlements cannot vary the terms of the conjugal relation, nor add to nor take from the personal rights and duties of the husband and wife. But he is speaking generally, and without reference to the question we are considering; and what he says is true as a general proposition, both in England and in this country. Indeed we find little or no authority in this country opposed to the view here taken of this question.

But in cases like the one before us, it is for the jury to say whether the wife has adequate means or not for her support.

As to the defendant's liability for the support of his child, it does not appear why the child is with the mother, whether with defendant's consent and approval or against his will and wishes. It may be with her in a way to charge the defendant for its support; but whether it is or not we cannot determine on this record. As to the law of the subject,

see *Rawlins v. Vandyke*, 3 Esp. 250; *Bazeley v. Forder*, 9 B. & S. 599; *Gill v. Read*, 5 R. I. 343; (73 Am. Dec. 73); *Reynolds v. Sweetser*, 15 Gray, 78. The case of *Gordon v. Potter*, 17 Vt. 348, which holds that a father is not liable for necessities furnished to his minor child except upon his promise, express or implied, to pay for them, is not opposed to these cases, for they also go upon the ground of an implied promise.

Judgment reversed and cause remanded.

MUNSON, J., dissents.

MONTAGUE v. BENEDICT.

1825. 3 *Barnewall & Cresswell*, 631.¹

ASSUMPSIT against a special pleader in considerable practice to recover for articles of jewelry, to the amount of £83, delivered to defendant's wife within the space of two months. The defendant lived in a ready-furnished house at the rent of £200 per year. The furniture was not new or expensive, some of it indeed being very shabby. The defendant kept no man-servant. The wife's fortune at marriage was less than £4,000. At the time of procuring these articles she already had jewelry suitable to her condition. There was no evidence that the husband had any knowledge of the delivery of these articles. The question was left to the jury, whether the husband gave the wife an express or implied authority to purchase. After a verdict for the plaintiff a rule *nisi* was obtained for a non-suit, on the ground that there was no evidence to be left to the jury of husband's assent to the contract.

Platt showed cause.

Scarlett and Gurney, contra.

BAYLEY, J.

If the tradesman in this case had exercised a sound judgment, he must have perceived that this money would have been much better laid out in furniture for the house, than in decking the plaintiff's wife with useless ornaments, which would so ill correspond with the furniture in the house. . . . If a tradesman is about to trust a married woman for what are not necessities, and to an extent beyond what her station in life requires, he ought, in common prudence, to inquire of the husband if she has his consent for the order she is giving; . . .

HOLROYD, J. I think the plaintiff ought to have been nonsuited. If the plaintiff had made a claim in respect of necessities provided for

¹ Statement abridged. Arguments omitted. Only portions of the opinions are given. — Ed.

the defendant's wife, the case would have stood upon a very different ground; but I think, upon the evidence, it appeared that the things provided were not necessities. They consisted of articles of jewelry, and the wife had upon her marriage been supplied with a sufficiency of such things, considering her situation in life.

LITTLEDALE, J.

... If a wife buy necessary apparel for herself, the assent of the husband shall generally be intended. But here the apparel provided consists of articles of ornament of considerable value. It does not appear, considering the defendant's occupation, and his wife's fortune, that articles of jewelry to that amount can be considered as necessary apparel, and one reason is, because the wife had articles of that description provided for her when she married, and there is no evidence to show that the husband ever saw the wife wearing these articles, and if he did not, then there is nothing to show any implied assent.

[The concurring opinion of ABBOTT, C. J., is omitted.]

Rule absolute for a nonsuit.

RAYNES v. BENNETT.

1874. 114 *Massachusetts*, 424.¹

CONTRACT upon an account annexed to recover \$175.50, for goods sold and delivered, as follows: March 10, 1871, one gold chain, \$15.00; March 10, 1871, one gold locket, \$10.50; May 6, 1871, one gold watch-chain, \$60.00; May 9, 1871, one gold watch, \$90.00.

At the trial in the Superior Court, before ROCKWELL, J., it appeared that the plaintiffs were jewellers; that the defendant was a carpenter and roofer, and that the jewelry was sold to the defendant's wife. The defence relied upon was that the goods were bought without the knowledge or authority of the husband, and that they were not necessities.

The defendant asked the court to rule that the articles did not come within the class of necessities, and that the question for the jury was whether they were purchased by the authority of the husband; but the court declined so to rule, and ruled that the question whether the goods were within the class of necessities, and whether they were necessary for the wife of a man in the defendant's condition and circumstances, were questions for the jury.

It appeared that the defendant's wife, May 9, 1871, left the defendant without his knowledge or consent, and took all the furniture of the defendant from his house in his absence, and that she had never

¹ Only a part of the case is given. — Ed.

returned to him, though they had met and conversed and had several times since corresponded by letter. It did not appear that she left because of any fault of the husband.

The court allowed the plaintiffs' witnesses, against the defendant's objection, to testify that he wore diamonds, and kept a fast horse.

Verdict for plaintiffs, for \$85.50.

G. Stevens & W. H. Anderson, for defendant.

C. A. F. Swan, for plaintiffs.

MORTON, J.

4. The fact that the defendant wore diamonds and kept a fast horse was competent, having some tendency to show his means and station in life.

7. One other question arose at the trial, which, as it will arise at a new trial, should be considered. The defendant asked the court to rule that the articles sued for did not come within the class of necessities, but the court declined so to rule, and did rule that the question whether the goods were within the class of necessities, and whether they were necessary for the wife of a man in the defendant's condition and circumstances, were questions for the jury.

The goods sued for were a gold chain and gold locket, sold in March, 1871, and a gold chain and gold watch sold in May, 1871. At the time the goods were sold, the husband and wife were living together. If a person sells goods to a wife who is living with her husband, he can hold the husband liable for them, either by proof that he, expressly or impliedly, authorized the purchase, or by proof that he refused or neglected to provide a suitable support for the wife, and that the goods sold were necessities. In the case at bar the plaintiffs contended that the goods sold were necessary for the wife, and that the husband therefore was liable for them, although he gave his wife no authority, express or implied, to purchase them.

Upon this ground the burden of proof was upon them to show that the husband refused or neglected to supply the wife with what was necessary for decency and comfort in his condition of life, and that the goods sold were such as the reasonable necessities of the wife required her to have. *Eames v. Sweetser*, 101 Mass. 78.

In such a case the ground of the liability of the husband is, that it is his duty to make suitable provision for his wife, and if he neglects to do so, she has the right to procure upon his credit such necessities as it is his duty to supply to her. *Hall v. Weir*, 1 Allen, 261; *Cunningham v. Reardon*, 98 Mass. 538.

The question whether the articles sued for fall within the class of necessities is often one of some difficulty. In some cases it is undoubtedly the duty of the court to rule as matter of law that certain articles do not come within the class of necessities for which a wife may pledge the credit of her husband without his consent: thus a stock

of goods sold for purposes of trade, or materials for building a house, or other articles not required or appropriated for her comfortable support, would not be necessities within the meaning of this rule of law. *Merriam v. Cunningham*, 11 Cush. 40; *Tupper v. Cadwell*, 12 Met. 559.

But when the goods are bought by the wife for her personal use, and are articles of utility and not mere ornaments, we think that the question whether they are necessities is a question of fact for the jury.

In *Davis v. Caldwell*, 12 Cush. 512, in which the question was whether certain articles sold to a minor were necessities, Shaw, C. J., says, "We think this is the true view of the law on this subject, that whether the articles sued for were necessities or not, is a question of fact, to be submitted to a jury, unless in a very clear case, when a judge would be warranted in directing a jury authoritatively, that some articles, as for instance, diamonds or race horses, cannot be necessities for any minor." The same question was considered in *Peters v. Fleming*, 6 M. & W. 42, and it was held that it was a question for the jury whether a watch and chain were necessities for a minor.

In *Hunt v. De Blaquiere*, 5 Bing. 550, it was held that it was a question for the jury whether articles of household furniture were necessities for a wife living apart from her husband.

As a general rule the term "necessaries," applied to a wife, is not confined to articles of food or clothing required to sustain life, or preserve decency, but includes such articles of utility as are suitable to maintain her according to the estate and degree of her husband. 2 Smith Lead. Cas. (6th ed.) 439.

We cannot say, as matter of law, that the articles sued for in this case cannot, under any circumstances, be necessities for a wife, and therefore are of opinion, that the question must be submitted to the jury, to determine whether they are, in whole or in part, necessities, under such circumstances as may be proved at the trial.

[On account of erroneous rulings on other points, the defendant's exceptions were sustained.]

GALLAND v. GALLAND.

1869. 38 California, 265.

APPEAL from the District Court of the Fourth District, City and County of San Francisco.

Smith & Rosenbaum, for appellant.

Robert Harrison, for respondent.

And - CROCKETT, J., delivered the opinion of the court:

The question presented on this appeal is, whether or not a wife, who, without cause or provocation, is driven from her husband's house with

her infant child, and is wholly without the means of support, can maintain an action against the husband for a reasonable allowance, for the maintenance of herself and child, unless she couples with the application a prayer for a divorce?

In the early days of English jurisprudence, the rights of the wife, as against the husband or his estate, were extremely limited. The theory was, that her separate entity was merged in his; that she was to be so completely under his dominion and control as to entitle him to administer reasonable personal chastisement for her offences; that she had no control over his estate, and could maintain no action against him for any cause whatsoever. A system so utterly inconsistent with a just and enlightened view of the marriage relation could not long withstand the advancing march of civilization. Gradually, but steadily, these stringent rules were relaxed in favor of the wife, until finally marriage came to be regarded in law as simply a civil contract between persons capable of contracting, and in which the parties were reciprocally entitled to certain reasonable rights, which the law would protect. Amongst other rights secured to the wife, is the right to be suitably supported and maintained by the husband, according to his means and station. If he fails or refuses to provide such support for her, the law authorizes her to purchase from others, on the credit of her husband, whatever is necessary for her maintenance and suitable to her station in life. There can be no diversity of opinion on this point, which is thoroughly well settled. But is this the only remedy for a deserted and dependent wife, who either has no subsisting cause for divorce, or who, having just grounds for dissolving the marriage, hopes for a reformation in her husband, and therefore does not desire a divorce? The purchasing from others, on the husband's credit, the necessaries for her support, affords, at best, a most humiliating, unreliable, and precarious means of subsistence. If the credit and pecuniary responsibility of the husband be unquestionable, the tradesman dealing with the wife takes the risk whether the articles furnished are really necessaries suitable to her condition; and he sells to her in view of a strong probability that his demand may be disputed by the husband, and will not be paid, except after an expensive litigation. But he may be wholly ignorant of the husband's pecuniary condition; or the husband, though rich, may have no visible, tangible property subject to be seized in execution; and in all or either of these contingencies, it is evident the wife of a wealthy husband might starve for lack of the necessaries of life, because of her inability to procure them on the husband's credit. If this resource fail her, how is she to obtain relief, if she either has no grounds for divorce, or does not desire a divorce? Is the law so deplorably deficient as to afford no remedy to a deserted and starving wife under these circumstances? If so, it is a reproach to the civilization of the age, and the law-making power should promptly correct the evil. But the law, in my opinion, is not amenable to this reproach, and affords an appropriate remedy.

The statute of this State regulating divorce and alimony, entitles the

wife to a divorce if the husband has deserted her for two years; and on filing her complaint, the court is authorized to grant her alimony, *pendente lite*—and permanent alimony, if she obtains the divorce. But there is no provision of the statute which authorizes an application for alimony, except in connection with a prayer for divorce; and it is claimed on behalf of the defendant, that, inasmuch as provision is made for the allowance of alimony only on an application for divorce, it was the intention of the Legislature to limit the power of the court to grant alimony to that class of cases. The maxim "*expressio unius est exclusio alterius*" is invoked as applicable to this proposition. But, in my opinion, it has no application to the case. The main subject-matter of the statute was the regulation of divorce; and only as incidental to that subject the statute prescribes the power of the court in respect to alimony in that class of cases. The Legislature was not dealing with the general subject of alimony, as an independent subject-matter of legislation; but, only, as one of the incidents of an application for divorce. It saw fit to define the power of the court over the allowance of alimony on an application for divorce; but was not considering the subject of alimony in any other class of cases. If it had provided that a writ of *ne exeat* or *distringas* might issue against a defendant in an action for divorce, it would scarcely be claimed by any one that this was equivalent to a declaration that such writs should not issue in any other class of actions. For the same reason, a provision for alimony in a suit for divorce is not to be considered as a declaration that alimony shall not be allowed in other actions. The maxim which is invoked has no application to this class of cases.

If alimony can be granted without an application for divorce, it can only be because it comes within the general powers of a Court of Equity, independently of the statute. In England, the decisions on this point have been by no means uniform. In some, the power has been maintained by eminent judges; in others, it has been doubted; and in a few, it has been denied. In America, there has been a similar diversity of opinion. The power of a Court of Equity to decree alimony, where no other relief was asked, has been upheld, in well considered cases, by the Supreme Courts of Virginia, Kentucky, North Carolina, South Carolina, and Alabama. In *Butler v. Butler* (4 Littell, Ky. R. 202), the question was elaborately reviewed by Judge Mills—one of the most eminent jurists of that State—and his reasoning is so convincing as to commend itself to every impartial mind. He says: "Suppose the case of abandonment by a husband, and that the separation is complete, without any sentence, and that the wife is left to the humanity of the world, without support, has the Chancellor, without the statute, or in cases not embraced by it, no authority to direct a portion of the husband's estate to be set apart for the support of the wife, leaving the marriage contract as obligatory as ever? This is a question different from the power of separation, and deserves separate consideration. It is true that the Courts of Chancery would always grant this after the

spiritual court had acted as to the separation, and before, when there had been an agreement (to separate) ; but without such previous sentence or agreement, could it never interfere? On this point, the English authorities are contradictory, and, indeed, somewhat irreconcilable.

Between such conflicting authorities, we consider ourselves at liberty to choose, and decide according to the principles of equity and reason of the case. It is clear that strong moral obligations must lie on any husband, who has abandoned his wife, to support her. The marriage contract, and every principle, bind him to this. To fail to do it, is a wrong acknowledged at common law — though that law knows no remedy, because there the wife cannot sue the husband. But in equity, the wife can sue the husband ; and it is the province of a Court of Equity to afford a remedy where conscience and law acknowledge a right, but know no remedy. Why, then, should the Chancellor shrink at this case and refuse a remedy? It is evident that this arose in England, for fear of intruding upon the ground occupied by the Ecclesiastical Courts. These courts were incorporated with their government, and as much composed a part of the civil organization of that country as our County Courts do here, and their sentence on subjects within their jurisdiction was as obligatory, and as much noticed in their civil courts, as the decisions of other courts ; and, indeed, they kept and held jurisdiction of some matters strictly temporal. It became necessary to draw the line of demarcation around them, and restrain other tribunals from occupying the same ground, and to refuse to entertain concurrent jurisdiction, leaving the party to apply there for his or her remedy. But, in this country, we have no such courts or boundaries around them to notice. The reason, then, for refusing the jurisdiction of such cases as are peculiarly temporal — and especially this case, which lies within the compass of the general grant to the Chancellor — has here ceased and does not exist. And grievous wrongs might exist, without remedy, until the Legislature interfered — which is against a well-known principle, ripened into a maxim. Indeed, probable cases might be supposed and known, where, in one year, absolute starvation might be the consequence of abandonment and withdrawing the means of support, if the Chancellor has no power to interpose. We therefore conceive that the Chancellor before the statute, and since, in cases not embraced by it, which have strong moral claims, had and has jurisdiction to decree alimony, leaving the matrimonial chain untouched ; and that these authorities, which decide in favor of such jurisdiction, ought to prevail."

I can hope to add nothing to the cogency of this reasoning, which appears to me to admit of no satisfactory answer.

The same proposition is maintained in *Purcell v. Purcell* (4 Hen. & Mun. 507) ; *Almond v. Almond* (4 Randolph, 662) ; *Logan v. Logan* (2 B. Mon. 142) ; *Prather v. Prather* (4 Desasseur, 33) ; *Rhame v. Rhame* (1 McCord, Ch. R. 197) ; *Glover v. Glover* (16 Ala. R. 446).



It has been the constant practice of Courts of Equity, not only to enforce agreements for separation and a separate maintenance of the wife, where a divorce was not asked for or decreed, but in such cases, as remarked by Judge Mills, in *Butler v. Butler (supra)*, "where the existence of an agreement (to separate) was relied on, the court only used it as a pretext for jurisdiction, and did not confine itself to the terms of the agreement, but departed from it in making such allowance as was equitable." If the court would entertain jurisdiction to enforce an agreement for separation, and then felt itself at liberty to depart from the terms of the agreement in awarding an allowance to the wife, it is difficult to discern, on any principle of reason or justice, why it should refuse to take jurisdiction, when the husband simply turns his wife out of doors, without cause, and refuses to support her. We do not perceive on what ground, a wife who *agrees* to separate from her husband, should stand on a more favored footing than one who clings to him in spite of his ill-usage, until she is driven from his house, and forbidden thereafter to speak to him. It is better, in our opinion, to abandon the subterfuge, to which courts have sometimes resorted in such cases, "as a pretext for jurisdiction," and administer the appropriate relief without the "pretext."

[The learned Judge then lays stress upon the laws of California; under which the wife not only retains her separate property, but has a joint and equal interest with the husband in all property acquired during the marriage.]

It is urged, however, in argument, that if this be our ruling, it will tend to breed discord in families, and to encourage discontented wives to abandon their husbands on frivolous pretexts of ill-usage, relying on the courts to compel the husbands to support them. On the other hand, however, it might be urged with even more force, that if such redress be denied to the wife in proper cases, dissolute and unprincipled husbands would be encouraged to abuse their wives, by a consciousness that any ill-treatment which stopped short of a lawful ground for divorce, was without redress in the courts. The courts must deal with human nature as they find it; and no system of jurisprudence can be so administered as to avoid possible abuses in exceptionable cases.

On the whole case, we think the demurrer to the complaint was properly overruled, and that the judgment ought to be affirmed, and it is so ordered.

SPRAGUE, J., delivered the following dissenting opinion, in which SANDERSON, J., concurred:

[After stating the case.]

At common law a wife cannot maintain an action against her husband for any purpose, under any circumstances, and if the present action can be maintained, it must find its warrant in our State legislation, or within the comprehensive but well-defined original, equitable jurisdiction of our courts.

The facts alleged in the complaint manifestly do not place the plaintiff within the direct provisions of any statute of this State authorizing an action to be maintained by a wife alone ; or against her husband for any purpose ; no fact or facts are alleged constituting a ground for divorce, nor does the action concern her separate property, nor her right or claim to homestead property. And in considering the question with reference to the right of the wife to maintain this action for the relief sought by virtue of the original equity powers and jurisdiction of our District Courts, the question naturally suggests itself, whether the statute of this State concerning divorce, which provides for temporary and permanent alimony, in connection with and based upon an action or final decree for divorce, does not, by necessary implication, exclude and deny a right of action for alimony, disconnected with and independent of an action for, or final decree of divorce.

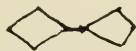
[After expressing the opinion that the statute does, by implication, exclude and deny the right of action here in controversy, the learned Judge proceeds to consider the jurisdiction of a Court of Chancery over such an application, in the absence of legislative enactments.]

. . . I am entirely satisfied, upon reason and largely preponderant authority of both English and American Chancery Courts, that the subject-matter of allowance for separate maintenance or alimony to the wife, as an independent matter, is not within the general original jurisdiction of Courts of Equity, and such jurisdiction is only exercised in reference thereto as derivative and incidental to some other primary, original, substantive matter, to which their jurisdiction had attached, or subject to their special control. Says Mr. Clancy : "These courts have no jurisdiction to decree such a provision to the wife, merely because her husband has deserted her, or because she finds it necessary for her safety to remove herself from his power, unless she has also property over which they have control. Such a jurisdiction belongs to the spiritual courts only, and even its authority arises but incidentally from the power it has of decreeing separation *a mensa et thoro*, when the wife libels her husband, on account of desertion or cruelty, and seeks the consequent relief." (Clancy on Married Women, Chap. IX., p. 549.) And Mr. Bishop, in his very admirable work on Marriage and Divorce, after giving the definition of the term alimony as "the allowance which the husband, by order of court, pays to his wife living separate from him for her maintenance," says : "The allowance may be for her use either during the pendency of a suit, in which case it is called alimony *pendente lite*, or, after its termination, called permanent alimony. It has no common-law existence as a separate, independent right ; but, wherever found, it comes as an incident to a proceeding for some other purpose, as for a divorce—no court in England having any jurisdiction to grant it where it is the only relief sought." (2 Bishop on Mar. and Div. 4th edition, Sec. 351, p. 549.) Again, after a very general citation and review of English and American authorities, the reasons and founda-

tions for the rule, as above stated, are briefly presented in Section 374 (561) as follows: "As a general proposition, a decree for separation in favor of the wife must be attended, if she asks for it, by a decree for alimony. And, upon the same principle rests the better and general doctrine already discussed, that no court can grant alimony when it is the only thing sought, because, in the nature of the case, an adjudication allowing the wife to live separate from the husband is a necessary foundation for an adjudication compelling him to pay her a separate support. His ordinary duty is to maintain her in cohabitation with him — not otherwise; and the court cannot adjudge him obligated to do it in separation until it adjudges that she may live separate. . . . Upon the same principle rests the legal liability of the husband to pay any third person for necessities which himself has refused to provide; but here, as the wife is not a party to the suit, the adjudication can extend no further than to control the particular case. . . . In short, the doctrine extends through the entire field of our law as administered alike in the common law, equity, and ecclesiastical tribunals, that, in effect, whenever the wife is adjudged entitled to live separate from her husband, by reason of breaches of matrimonial duty committed by him, a concurring adjudication must be pronounced that he support her while so living; the one adjudication being commensurate in extent with the other, and neither one existing without the other." (See also 2 Story's Eq. Jur. Secs. 1422, 1424; Fonbl. Eq. B. 1, Ch. 2, Sec. 6, Notes *n n*; *Fischle v. Fischle*, 1 Blackf. 365; *Chapman v. Chapman*, 13 Ind. 397; *Shannon v. Shannon*, 2 Gray, 285; *Shafe v. Shafe*, 4 Foster, 567; *Parsons v. Parsons*, 9 N. H. 309; *Lawson v. Shotwell*, 27 Miss. 633; *Doyle v. Doyle*, 26 Mo. 549; *Yule v. Yule*, 2 Stockt. 143; *Covey v. Covey*, 3 Id. 400; *McGee v. McGee*, 10 Geo. 482; *Peltier v. Peltier*, Harrig. Mich. Ch. R. 29.)

In several States, by legislative enactment, proceedings for obtaining an allowance for the separate maintenance of the wife, disconnected with proceedings for or a decree of divorce, is authorized.

[Remainder of opinion omitted.]



SECTION XV.

Criminal Liability of Wife.

COMMONWEALTH v. WINIFRED FEENEY.

1866. 13 *Allen* (Massachusetts), 560.

INDICTMENT for keeping a tenement used for the illegal keeping and sale of intoxicating liquors.

At the trial in the Superior Court, before WILKINSON, J., there was evidence tending to show that the defendant was a married woman whose husband hired the tenement and had carried on the business of selling spirituous liquors there, until his conviction and imprisonment in jail therefor; and that, at the time of his imprisonment, he had liquors on hand which he directed her to sell, and she thereafter took charge of the tenement and made sales therein. The judge ruled that if she made such sales in the absence of her husband she would be liable therefor, notwithstanding such direction of her husband.

The jury returned a verdict of guilty, and the defendant alleged exceptions.

N. Richardson, (*A. F. L. Norris* with him,) for the defendant.

Reed, A. G., for the Commonwealth.

GRAY, J. The only exception which has been argued is to the instructions given to the jury. No authority has been cited in its support, and it has no foundation in principle. A wife is not protected from responsibility for crime by her husband's order or direction, unless she is within his presence and control, so as to be presumed in law to act by his coercion. *Commonwealth v. Bush*, 11 Gray, 437; *Commonwealth v. Butler*, 1 Allen, 5, and authorities there cited. This defendant's husband was not only absent, but in prison, and could not control or coerce her.

Exceptions overruled.

COMMONWEALTH v. MARY BURK.

1858. 11 *Gray* (Massachusetts), 437.

INDICTMENT for unlawfully selling intoxicating liquors in violation of St. 1855, c. 215, §§ 15, 17. At the trial in the Court of Common Pleas in Plymouth, before BISHOP, J., there was evidence tending to show that the defendant was a married woman and that at the time of the sales, which were in a dwelling-house, her husband was either within or just outside of the house.

The defendant requested the judge to instruct the jury "that if they found that the husband was near enough for the wife to act under his immediate influence and control, though not in the same room, the wife was not liable for such sale." But the judge instructed the jury "that if the husband was actually present at the time of the sale, the wife would be presumed to act under his coercion, and could not be found guilty; and that if the wife sold the liquor as the agent and by authority of her husband, and as such received the money, the jury would be authorized in finding her guilty." The defendant, being convicted, alleged exceptions.

P. Simmons, for the defendant.

S. H. Phillips, (Attorney General,) for the Commonwealth, cited *Rex v. Morris*, Russ. & Ry. 270; *Rex v. Hughes*, 2 Lewin, 229; *Commonwealth v. Murphy*, 2 Gray, 513; Sts. 1855, c. 215, § 17; c. 304, § 3.

THOMAS, J. 1. The instruction prayed for by the defendant should, we think, have been given. If the wife acts in the absence of the husband, there is no presumption that she acts under his coercion. *Commonwealth v. Murphy*, 2 Gray, 511. But if the husband "was near enough for the wife to act under his immediate influence and control, though not in the same room," he was not absent, within the meaning of the law.

2. The wife, acting in the presence of the husband, and under his immediate influence and control, is not an agent within the meaning of the St. of 1855, c. 215, § 15. The law regards her as not in the exercise of her own discretion and will, and therefore as incapable of committing an offence. How far the usages of society, or the new relations of husband and wife, may have qualified or reversed the presumption of the common law, is for the Legislature, not the court, to consider.

Exceptions sustained.

COMMONWEALTH v. MARY EAGAN.

1869. 103 *Massachusetts*, 71.¹

COMPLAINT for assault and battery on one Saxton.

At the trial in the Superior Court, before PITMAN, J., "the evidence showed that, while the defendant's husband and son were using angry words towards Saxton, the defendant, in the immediate presence of her husband, threw a pail of dirty water on Saxton. This was all the material evidence in the case. Upon these facts, the defendant asked the judge to instruct the jury that the presumption was that she acted under the coercion and control of her husband, and should be acquitted; but the judge declined, and instructed the jury that, if they were satisfied that she did the acts proved of her own free will, free from the coercion

¹ Only so much of the case is given as relates to a single point. — ED.

or influence of her husband, they would be warranted in convicting her."

The defendant was found guilty.

J. Brown, for defendant.

G. Murston, for Commonwealth.

[Citations omitted.]

MORTON, J. The assault of which the defendant was convicted was committed in the immediate presence of her husband. The presumption of law is, that she acted under his coercion. *Commonwealth v. Gannon*, 97 Mass. 547; *Commonwealth v. Burk*, 11 Gray, 437. It was a right of the defendant to have this principle of law stated to the jury. Her counsel asked the court to instruct the jury "that the presumption was that she acted under the coercion and control of her husband, and should be acquitted." If there was evidence in the case to rebut the presumption in favor of the defendant, the court was justified in refusing to instruct the jury that she should be acquitted; but we think that the first part of the instruction requested should have been given. The instructions actually given would have been accurate if the court had also instructed the jury as to the presumption above stated, but by the refusal to do so the defendant was deprived of the benefit of this presumption as one of the elements proper for the consideration of the jury in determining her criminal liability.

Exceptions sustained.

BIBB v. STATE.

1891. 94 *Alabama*, 31.

FROM the City Court of Montgomery.

Tried before the HON. THOS. M. ARRINGTON.

The defendant in this case, Judy Bibb, was indicted jointly with her husband, Joe Bibb, for the murder of Ed. Stark, "by striking or cutting him with an axe." On the trial of said Judy, who pleaded not guilty, "the State introduced evidence tending to prove that, in said county, and before the finding of the indictment in this case, Ed. Stark was killed by the defendant and her husband, Joe Bibb, by cutting him with an axe, as alleged in the indictment; that the defendant held said Stark from behind, holding down his arms, while her husband cut him in the head with an axe; and that said Joe Bibb, while said killing was being done, was heard to say, 'Hold him up, G— d— it, hold him up.' This was all the evidence necessary to an understanding of the points reserved. The court thereupon charged the jury, among other things, as follows: 'In the trial of this case, on the issue of guilty or not guilty, the jury should not consider the defendant otherwise than as a *femme sole*.' The defendant excepted to this charge, and requested

the following charge in writing: 'Unless the jury believe that the defendant acted willingly and voluntarily, they must acquit her.' The court refused this charge, and the defendant excepted to its refusal."

B. C. Tarver, and *Gordon Macdonald*, for appellant.

[Citations omitted.]


Wm. L. Martin, Attorney General, for State.

[Citations omitted.]

CLOPTON, J. On the trial of defendant for murder, the court instructed the jury: "In the trial of this case, on the issue of guilty or not guilty, the jury should not consider the defendant otherwise than as a *femme sole*." There is no error in this charge. The presumption of the common law, that when the wife acts with her husband in the commission of a crime, she acts under his coercion, and consequently without guilty intent, is not allowed in all offenses, in the administration of the criminal law. "It may not be positively settled," as has been well observed, "where the line of separation is; but for certain crimes the wife is responsible, although committed under the compulsion of her husband." 1 Bennett & Heard Cr. Cases, 85. The exceptions engrafted on the general rule, are based on the nature, grade, and heinousness of the felony; and among these is murder. The rule that the law holds the wife answerable for murder, though committed in the presence of, or in company with her husband, without any presumption that she acted under his coercion, and that she is punishable as much as if sole, is sustained by the great weight of authority. 1 Hale's P. C. 45; 1 Hawk. Pleas, 4; 1 Cooley's Black. Com. 444; 1 Bishop's Cr. L. § 361; 14 Am. & Encyc. of Law, 649.

On the same principles, the charge asked by defendant was properly refused.

Affirmed.



SECTION XVI.

Post-Nuptial Torts of Wife.

HEAD v. BRISCOE, BART., AND WIFE.

1833. 5 Carrington & Payne, 484.

ACTION for a libel published by the female defendant, Dame Sarah Briscoe. Plea — that she was not guilty.

It appeared that the plaintiff, who was a house agent, had let a house to a Mrs. Toleson, with whom the female defendant lived for some time, when, they having quarrelled and separated, the female defendant caused a placard to be printed and stuck about in the street, which commenced as follows : — “Felony. Ten guineas reward. Whereas Mary Toleson, of &c., late of &c., was left in charge of a house, &c.” It then went on to charge Mrs. Toleson with having stolen some furniture belonging to the female defendant, and added these words — “It is supposed that Mary Toleson was assisted by George Head, house agent, of No. 7, Upper Baker Street, New Road, in conveying the same to his house for the purpose of secreting it.” Information was requested, at the bottom of the bill, to be given to Messrs. Pasmore & Taylor, Basinghall Street.

Wilde, Serjt., for the plaintiff. A person suspecting a felony may reasonably do what is necessary to apprehend the felon, but this mention of the plaintiff could not be necessary. I admit that Sir W. Briscoe had nothing to do with the libel, and only require such damages as may relieve the character of the plaintiff from any suspicion. The defendant, Sir W. Briscoe, is living separate from his wife; yet he is answerable for her acts, until he obtains a dissolution of the marriage. And if he has been correct in his own conduct, and his wife has not, he may relieve himself from any liability by application to the proper courts.

Adams, Serjt., for the defendant Sir W. Briscoe. This is a case of first impression. I have searched all the law books from the earliest time, and cannot find the principle even agitated. The defendant, Sir W. Briscoe, cannot be acquainted with the circumstances of the case. The ground of damages in an action of libel, when no special damage is averred, is the existence of malice; and then in this case there is no malice on the part of my client. But if he is by law to be charged, the most temperate damages should be given. The plaintiff should have indicted the female defendant instead of bringing an action for damages against her husband.

TINDAL, C. J. There is no doubt, in point of law, that a husband, so long as the relation of husband and wife continues, is answerable to a third person for what is done by the wife. And whether their separation be permanent or temporary it does not affect the question, unless it operates so upon the marriage as to make that civil relation cease;

for, by the law of England, you cannot bring an action against the wife without joining the husband; and a man would be without remedy if he could not sue the husband. Upon this ground I have no doubt, as at present advised, that the action is maintainable. If I am wrong in my opinion the learned counsel for the defendant will have an opportunity of moving the court.

His Lordship left the question of damages to the jury, who found a verdict for the plaintiff —

Damages 40s.

Wilde, Serjt., and *Hutchinson*, for the plaintiff.

Adams and *Bompas*, Serjts, for the defendant Sir W. Briscoe.

In the ensuing term, *Adams*, Serjt., moved pursuant to the leave given; but the court, after observing that there was no evidence that the wife was living in adultery —

Refused a rule.

MARSHALL v. OAKES AND WIFE.

1864. 51 *Maine*, 308.

EXCEPTIONS from the ruling at *Nisi Prius* of BARROWS, J.

Replevin. The defendants claimed that the sheep replevied were the property of the female defendant. It was admitted that the defendants were husband and wife.

There was evidence tending to show that the wife was the active party in taking the sheep.

The defendants excepted to the refusal of the presiding judge to give the jury the following requested instructions:

(1st.) That, if the title to the sheep in question is found by the jury to have been in the plaintiff at the time of the alleged taking and detention; and also find that the defendants were husband and wife at the time of the alleged taking and detention, and that the taking and detention were by them jointly or in company of each other, or by the wife in the presence of the husband, their verdict should be for the defendants.

(2d.) That if the title to the sheep in question is found to have been in the plaintiff at the time of the alleged taking and detention, and that the defendants were husband and wife at the time of the alleged taking and detention, and that the taking and detention were by them jointly, or by the wife in the presence of the husband, or in his company, that the husband is alone guilty and liable.

Bolster & Richardson, in support of the exceptions.

Hammons, *contra*.

The opinion of the court was drawn up by

KENT, J. The instructions actually given are not stated in the exceptions. The exceptions are to the refusal of the judge to give the

specific rulings requested. We are only called upon to determine whether the judge was bound to give the precise instructions requested. These requests were, in substance, that, if the plaintiff had proved property in himself, and a taking and detention by the defendants, yet, if the defendants were husband and wife, and the taking and detention were by them jointly, or by the wife in presence of her husband, that the verdict must be for the defendants, or, at least, that the husband alone could be held guilty.

The general rule of the common law is that the husband is liable for the torts of his wife. *Hawks v. Hamar*, 5 Binney, 43. But the question here is as to their joint liability. When the tort or crime is committed by the wife alone, and without the presence or direction of her husband, she may be held liable, civilly and criminally. In such cases, the civil action must be against both the husband and the wife. 2 Kent's Com. 149; *Head v. Briscoe*, 5 Car. & P. 484 (24 E. C. L. 419); *Keyworth v. Hill & ux.*, 3 B. & Ald. 685 (5 E. C. L. 422). But, if committed in his presence and by his direction, he alone is liable. 2 Kent's Com. 149.

The *prima facie* presumption is, that the wife acted under coercion, if the husband was actually present. This presumption arises as well in civil suits for torts, as in criminal cases. Hilliard on Torts, c. 42, § 57. If nothing appears but the fact that the wrong was done whilst they were both together, the jury should be instructed to acquit the wife. Such presumption, however, is but *prima facie*, and may be rebutted by the facts proved, showing that the wife was the instigator or more active party, or that the husband, although present, was incapable of coercion,—or that the wife was the stronger of the two. Wharton's Am. Cr. Law, Book 1, § 73; 1 Hale, 516. The coercion must be at the time of the act done, and then the law, out of tenderness, refers it, *prima facie*, to the coercion of the husband. *Ib.* § 74.

This presumption is one of the compensations, or offsets, which the old common law gave for the benefit and protection of the wife, for its stern and unyielding doctrines in relation to the superior marital rights of the husband, by which the rights,—the personal property, and legal existence of the wife are nearly all lost or merged in her baron or lord. As was forcibly said by Mr. Justice Emery, in *State v. Burlingame*, 15 Maine, 106, "The whole theory of the common law is a slavish one, compared even with the civil law. The merging of the wife's name in that of her husband is emblematic of the fate of all her legal rights. The torch of Hymen serves but to light the pile on which those rights are offered up."

It was a natural and logical result, as the founders of the common law clearly saw, that, if the husband was to be regarded as the head and sole representative of the union, the wife should have the benefit of her legal nonentity, when acting in presence of her husband, even if she apparently was not an unwilling actor. Her misdemeanors and trespasses were to be looked upon, not as arising from the promptings of

her own mind or will, but as the result of the overpowering commands or coercion of him whom she had promised to obey. How carefully the fathers studied the first case in point, recorded in the history of man (Genesis, chap. iii.), or, some of the subsequently reported cases, where, to common observation, the woman and wife appears as the prime mover in wrong and mischief, we cannot know and need not discuss.

But, to meet the actual facts of history and observation, the law has engrafted the qualification on the rule, before stated, viz., that the *prima facie* presumption may be overcome by the proof in the case, that, in fact, the wife was the originator, dictator, and principal offender. Hiliard on Torts, c. 42, § 1; *Com. v. Lewis*, 1 Met. 153. Where there are other facts established, besides the presence of the husband, as to the participation of the wife in originating and carrying on the common purpose, which tend to rebut the presumption, it is a question for the jury to determine whether or not the presumption is overcome.

In the case at bar, as before stated, we are called upon to determine only whether the judge was bound to give the instructions requested or either of them. We are not to presume that no instructions on the point were given, or that those given were necessarily erroneous, because those requested were not given. But, if the requested and refused rulings cover the whole ground and contain the true rule which should govern and control the case, the party may sustain his exceptions. When the refusal of the specified instructions necessarily implies that a contrary and incorrect rule was given, or that the jury were left without instructions on the point; or when they cover the whole principle, and it is clear that the case required that the law should thus be stated, exceptions may be sustained, although only the requests are stated in the report.

Unless a party is quite certain that his requests cover the whole ground, it is always safer to state what the actual rulings were.

In this case, the requests were that the jury should be instructed as matter of law, absolute and conclusive, that if the husband and wife were both present and the taking was joint, or by the wife in the presence of the husband, the verdict must be for the defendants, or at least for the wife. Or, in other words, that the presumption arising from the presence of the husband was conclusive in law, and that it could not be rebutted by other facts. The true rule, as we have seen, is that such presence raises a *prima facie* presumption, subject to be overcome by proof negating clearly the presumed coercion or command. We have nothing in the case to show that the instructions given were not in the very words of the request, with the addition or qualification above stated, in reference to rebutting testimony. We do not think the judge was bound to give the requested instructions, as a rule of law, without the qualification.

When the requested instructions would have been correct, with the addition of a single qualifying word, the omission of that word in the requests was held fatal to the exceptions. *Stowe v. Heywood*, 7 Allen, 118.

The requests, in this case, state but a part of the rule, and are therefore imperfect.

On looking at the evidence, as reported, there seems to be enough for the consideration of the jury on the question whether the presumption was overcome or not. The wife claimed the property as her own, and seems to have been quite active in the taking, and apparently of her own will and motion. At all events, the judge was not bound to say, as matter of law, that there was no evidence tending to show a state of facts which might rebut the presumption.

In an action of trespass against husband and wife, for a joint assault, where the evidence was that the wife was the real and principal offender, it was held that it was clearly a case to be submitted to a jury; the presumption being only *prima facie*, and, like other presumptions, liable to be overcome by testimony. Hilliard on Torts, c. 42, § 7.

It is unnecessary to consider the effect of the recent statutes in relation to married women.

Exceptions overruled. Judgment on the verdict.

APPLETON, C. J., CUTTING, DAVIS, DICKERSON, and BARROWS, JJ. concurred.

WRIGHT v. DANIEL LEONARD AND WIFE.

1861. 11 *Common Bench Reports, New Series*, 258.¹

DECLARATION alleging that the female defendant, Elizabeth Leonard, falsely and fraudulently represented to plaintiffs that certain bills of exchange purporting to be accepted by her husband were in fact accepted by him; and that plaintiffs relying on such representation discounted the bills, and sustained loss thereby. Plea, that Elizabeth, at the time of making the alleged representation, was the wife of the defendant Daniel. To this plea the plaintiffs demurred. Joinder in demurrer.

J. H. Hodgson, in support of the demurrer.

Gray, contra.

Cur. adv. vult.

The court being equally divided in opinion, the judges proceeded to deliver their judgments *seriatim*, as follows:—

BYLES, J. I am of opinion that our judgment should be for the defendants.

The record shows that the female defendant, a married woman, fraudulently represented to the plaintiffs that certain acceptances were the acceptances of her husband, and thus the plaintiff, relying on those representations, was thereby induced to advance money on the bills to one Salt, the drawer.

¹ Statement abridged. Arguments omitted. — Ed.

The law is settled, that a married woman is liable with her husband for her torts, but that, on the other hand, she is not liable on her contracts made during coverture.—The law is the same as to infants: they are liable for their torts, but not (with certain exceptions) on their contracts. There is a class of intermediate cases, partaking partly of the nature of contracts and partly of the nature of torts, in which the question arises to which category they are to be referred.

It is not easy to lay down any general rule on the subject: but I conceive that, at all events, misrepresentations on the faith of which the plaintiff has acted, and which might have been treated by him as contracts or warranties, are not binding on the *feme covert* or the infant; for, if they were binding, then the protection which the law throws over married women and infants would be in great measure withdrawn. Thus, a misrepresentation by an infant that he is of full age (*Johnson v. Pye*, 1 Levinz, 169, 1 Sid. 258, 1 Keble, 905, 913), or a false statement by a married woman that she is discovert (*Cooper v. Witham*, 1 Levinz, 247, 1 Sid. 375, 2 Keble, 390; *Cunnam v. Farmer*, 3 Exch. 698), are no ground of action.

In America, there have been a great number of decisions to the effect that an infant is not liable for fraud, in cases where a contract is in substance the ground of action, or where it is contained in a contract which he is not capable of making: see *Wilt v. Welsh*, 6 Watts, 9; *Brown v. Durham*, 1 Root, 273; *Wallace v. Morse*, 5 Hill, 391; *Morrill v. Aden*, 19 Vermont, 505. .

And it should seem that the law is the same in cases where there may be other objections to the validity of the contract besides the disability of the infant or married woman; such, for example, as the absence of consideration: for, otherwise, an infant or a married woman might be liable where they have received no consideration, and not liable where they have received consideration.

The cases in which a married woman is liable for defamatory words are obviously distinguishable from cases in which she is sought to be made liable in an action *ex contractu* or *ex quasi contractu*. In the case of defamatory words, there is not only no contract or semblance of a contract on the part of the married woman herself, but there is no agreement or assent express or implied on the part of the plaintiff. This distinction is indicated somewhat obscurely in the case of *Cooper v. Witham*, as reported in Levinz.

In the present case, the representation on which it is sought to charge the husband and wife seems to me to be in the nature of a warranty. But, for the reasons above given, it does not appear to me necessary to decide whether on such a warranty as is described in the declaration, an action might be brought, independently of the objection of coverture.

WILLES, J., delivered the joint judgment of WILLIAMS, J., and himself:—

In this case husband and wife are sued for a false and fraudulent

representation by the wife to the plaintiffs that the acceptance on bills of exchange offered to them for discount by one Salt was of the handwriting of the husband, whereby the plaintiffs were induced to advance money to Salt by way of discount of the bills, which was lost by reason of the acceptances being forgeries.

The question is, whether these facts constitute a cause of action against the husband and wife. We are of opinion that they do. As a general rule, a married woman is answerable for her wrongful acts, including frauds, and she may be sued in respect of such acts jointly with her husband, or separately if she survives him. The liability is hers, though, living with the husband, it must be enforced in an action against her and him, which, to charge him, must be brought to a conclusion during their joint lives. Inasmuch, however, as she is not liable upon her contracts, the common law, in order effectually to prevent her being indirectly made so liable under color of a wrong, exempts her from liability even for fraud, where it is "directly connected with the contract with the wife, and is the means of effecting it, and parcel of the same transaction." Such was the decision of the Court of Exchequer in *The Liverpool Adelphi Loan Association v. Fairhurst*, 9 Exch. 422, 429. This is the extreme length to which the exemption has been carried in any decided case; and we do not consider ourselves entitled, upon grounds of supposed policy only, to infringe further upon the general rule of law.

We ought also to add that this exception, in favor of fraud accompanying a contract, does not, so far as we have been able to discover, exist in the civil law, nor in the law administered in the Court of Chancery, nor in that of Scotland, — which may be thought to show that it is not founded in any general principle, and therefore not to be enlarged. For the civil law as to minors, see 3 Savigny's Roman Law, cap. III., § cviii., p. 33 of French edition; Mackeldey, translation of 1st part, 222. For the Scotch law as to infants, see 1 Bell's Com. 18. For the law of Chancery as to infants, see *Stikeman v. Dawson*, 1 De Gex & Sm. 90; *Ex parte Unity Bank Association*, 3 De Gex & Jones, 63. For the Scotch law as to married women, see 1 Bell's Com. by Shaw, 6th edit., 679: for the doctrine in Chancery, see *Vaughan v. Vanderstegen*, 3 Drewry, 165, 369, 27 Law J., Ch. 793.

The present case falls within that general rule, there having been, if the declaration truly states the facts, no contract with the wife. In the event of her evidence showing a contract in the course of entering into which the alleged misrepresentation was made, the question will then arise upon the facts, under the general issue, whether such a fraud is shown as falls within the rule or the exception. For the present, seeing that liability for a naked fraud, not accompanying a contract, is in question, we think there should be judgment for the plaintiffs.

ERLE, C. J. Upon this demurrer the question is raised whether a husband is answerable for the alleged false representation made by his wife: and I am of opinion that he is not. The law makes him answer-

able for wrongs done by his wife to the property, person or character of another, but not answerable for contracts made by his wife. It seems to me that a false representation by which credit is obtained is in its nature more fit to be classed with contracts than with wrongs. It is in substance a warranty of a debt, and so a contract. The liability is created by the words of the wife, amounting to a contract or guarantee, to which are to be added an intention on her part to deceive and a deception effected on the plaintiff. But, in substance, she becomes a guarantor for a third party, and makes a contract for which in the form of contract the husband is not answerable.

The nearest authority on the point is in favor of the defendant; for, in the *Liverpool Adelphi Loan Association v. Fairhurst*, 9 Exch. 422, it was held that the husband is not answerable for a false representation made by his wife in connection with a contract made by her. It is there decided that he is to be exempt from responsibility for the false representation so made. I see no reason for holding that the exemption should be limited to the particular case there in question. I see no reason why the addition of a breach of contract to a false representation should create the exemption.

One reason assigned in argument for the exemption was, that the damage arises from the credulity of the plaintiff, who chooses to trust the wife: but that reason would exempt the husband in respect of all false representations made by the wife.

I would further observe that liability for false representations which are unconnected with contract was first affirmed in *Pasley v. Freeman*, 3 T. R. 51. The motive for the judgment of the majority of the judges in that case, is, the desire to suppress fraud: but by that desire they created an undefined liability, of which parties have availed themselves for fraudulent purposes; so that the effect of the decision has been the reverse of that which was intended. If this view is correct, there is good reason for not carrying the principle beyond the cases to which it has been adjudged to apply: and it has not been adjudged to apply to the false representation made by a wife.

For these reasons, together with the reasons and authorities adduced by my Brother BYLES, I think our judgment should be for the defendant.

Judgment for the plaintiffs.

The plaintiffs being desirous of taking the opinion of a court of error, WILLIAMS, J., withdrew his opinion, and consequently the judgment was entered *pro formâ* for the defendant.

Judgment accordingly.

SECTION XVII.

Tortious Damage to Wife, or to Husband's Right in Wife.

'BALLARD v. RUSSELL'

1851. 33 Maine, 196.

(ON report, from *Nisi Prius*, WELLS, J., presiding.)

(Case for an injury to the female plaintiff, by mal-practice of the defendant, in attempting to reduce a fracture of the forearm and dislocation of the wrist. The husband prior to the injury had deserted the wife, and for eight years had made no provision for her support. He resided in the same town, and in co-habitation with another woman.

The defendant introduced an unsealed discharge, signed by the husband, and given prior to the suit, stating that he had received of the defendant, fifty dollars, in full for the injury. The counsel for the female plaintiff, then offered a document, (of one day's date later than the discharge,) by which the husband assigned to the wife the cause of action, and empowered her to collect the same for her use, and to make all needful use of his name. The case was taken from the jury and submitted to the court. If the court should conclude that the discharge given by the husband to the defendant would defeat the action, the counsel moved to amend, by striking the husband's name from the writ, and that thereupon the action should stand for trial.

WELLS, J., orally.

It is suggested that the discharge by the husband to the defendant was obtained through fraud. The court cannot yield to that suggestion. If the plaintiffs would have availed themselves of it, the question should have been submitted to the jury.

By the common law, both husband and wife must join to maintain an action like the present. This case does not come within any exception to the principles stated. The husband has not abjured the realm; and the facts stated in the report of the case, do not deprive him of the power to control the action nor to discharge the cause of it.

The statutes giving additional rights and remedies to married women, relate to property, and do not apply to this case. Hence the proposed amendment, by striking out the name of the husband, would be of no advantage to the wife.

It appears that the husband, the day after he had discharged the cause of action, gave his wife a written power of attorney to prosecute the claim for her own benefit. But the cause of action having been previously discharged, could not be revived by such an instrument.

~~It results that the action cannot be maintained, and the plaintiffs must be called.~~

-LOVINA LAUGHLIN v. EATON.-

1866. 54 Maine, 156.¹

BARROWS, J. To this action for malicious prosecution upon a charge of adultery, the defendants seasonably pleaded in abatement the coverture of the plaintiff. Plaintiff replied denying the coverture and tendering an issue to the country, which was joined by defendants, and the case was submitted to the presiding judge to be decided without the aid of a jury upon an agreed statement of facts. . . .

[Upon this statement, the court found that the plaintiff is the wife of John Laughlin, who went to California six or seven years ago and is still living there. Since he went there, he and the plaintiff have kept up a correspondence as husband and wife, he sending her funds quite often. It was agreed that if the facts admitted "are in law sufficient to sustain the plea in abatement," the issue was to be found for the defendants. The opinion, after discussing the evidence of marriage, proceeds as follows.]

The well known general doctrine of the common law is, that where a wrong is committed against the person of the wife during coverture, as by beating her, slandering her reputation, or by malicious prosecution, she cannot sue alone. For injuries to the wife occasioning to the husband a deprivation of the society of his wife, or of her assistance in his domestic affairs, or by which he is put to expense, he may have his separate action, as where a violent battery has caused a long continued illness of the wife or expense in her cure, or if she be maliciously indicted and thereby separated from him, or he put to expense in her defence. But, if the action is brought for *her* personal suffering and injury, the husband and wife must join, and care should be taken not to include in the declaration a statement of any cause of action for which the husband alone would be entitled to recover. 1 Chitty's Pl. 46, 47, 61; *Horton & ux. v. Byles*, 1 Siderfin, 387; *Russell & ux. v. Corne*, 1 Salkeld, 119; *Hyde v. Scysson*, Cro. Jac. 538.

When an injury is done to both, as slander or battery of husband and wife, separate actions must be brought, one by the husband alone for the injury to him, and one by the husband and wife for the injury to her. If both causes of action are joined it is error. *Ebersoll v. Crug & ux.*, in error, 3 Binn. 555. There is nothing in this case which brings it within any known exception to the general rule above stated. John Laughlin has not been banished or abjured the country, or deserted his wife and gone beyond seas. So far as appears, he is still in frequent communication with her, supplying her with funds and only temporarily, though long, absent.

In *Gregory v. Paul*, 15 Mass. 30, cited for plaintiff, the wife of a foreigner, deserted by her husband in a foreign country, who had there-

¹ Argument and part of opinion omitted. — ED.

after maintained herself as a single woman, and lived for five years in Massachusetts, her husband never having been within the United States, was holden competent to sue as a *feme sole*. Sec. 10, chap. 61, of the R. S. of 1857, embodies the doctrine thus laid down, with some additions, as the law of this State. It is unnecessary to contrast the case of *Gregory v. Paul* with the one at bar, or to consider further under what circumstances the absence of the husband from the State will excuse his non-joinder in a suit of this description.

Nor do our other statutes authorizing married women in certain cases to maintain suits as if sole, enlarging the plaintiff's rights in a suit like this. Under § 3, c. 61, a married woman may, if she pleases, prosecute suits at law or in equity for the preservation and protection of her property as if unmarried, and may maintain an action in her own name to recover the wages of her personal labor, not performed for her own family.

But it was determined by this court, in *Ballard & ux. v. Russell*, 33 Maine, 196, that the statute enabling her to sue for the preservation and protection of her property did not extend to rights of action for tort to the person.

The plaintiff's counsel urges that, if enabled to sue in her own name, without joining her husband, for the protection of her property, much more ought she to have that power for the protection of her liberty and reputation, when her husband is out of the jurisdiction, or his consent cannot be had to join in the suit.

The argument would be appropriately addressed to the Legislature.

The present state of the law requires that the entry in this case should be

Exceptions overruled.

APPLETON, C. J., KENT, WALTON, DICKERSON, and DANFORTH, JJ., concurred.

SMITH, RESPONDENT, v. CITY OF ST. JOSEPH, APPELLANT.

1874. 55 *Missouri*, 456.

APPEAL from Buchanan Circuit Court.

Chandler & Sherman, for appellants.

I. Compensation for plaintiff's services in waiting upon his wife should have been claimed in the first suit. Plaintiff cannot split his cause of action.

II. The law gives no such damages.

III. The petition makes no claim therefor. (Sedg. Meas. Dam. 682, n. 1; 52 Me. 378; 2 Greenl. 284; 25 Ill. 86.)

Vineyard & Loan, for respondent.

I. The damages in the two cases are entirely different. In the former, the damages were incurred only by Mrs. Smith, in the latter they were suffered by the husband. (*Rogers v. Smith*, 17 Ind. 323;

Berger v. Jacobs, 21 Mich. 215; *Kavanaugh v. Janesville*, 24 Wis. 618; *Hooper v. Haskell*, 56 Me. 251; *McKinney v. Western Stage Co.*, 4 Iowa, 420; *Fuller v. Naugatuck R. R. Co.*, 21 Conn. 557; *Lewis v. Babcock*, 18 Johns. 443; *Long v. Morrison*, 14 Ind. 595; *Robulina v. Armstrong*, 15 Barb. 247.)

WAGNER, Judge, delivered the opinion of the court.

This was an action instituted by the plaintiff to recover damages for the loss of the services of his wife, and necessary expenses of medicine, doctor's bills and nurse hire paid out by him, in consequence of an injury to her which is alleged to have been occasioned by the negligence of the defendant. The charge is, that the injury to the plaintiff's wife was the result of her falling down an embankment in one of the streets of the defendant, which was negligently left in an exposed and dangerous condition. One branch of this case has previously been in this court. (*Smith v. City of St. Joseph*, 45 Mo. 449.) There the proceeding was in favor of the wife as the meritorious cause of action, the husband being joined with her under the requirements of the statute, to recover damages for the personal injuries and physical suffering that she sustained. But the petition was founded upon the same accident, and the same questions in regard to the defendant's liability and negligence arose in that case that arise here.

The rules of law then laid down, were strictly conformed to and pursued in the trial of this case, on the questions of defendant's liability and negligence, and therefore it is unnecessary to review them at the present time.

[Omitting opinion as to the sufficiency of the petition.]

The main questions, however, relied on for a reversal of this judgment, are, that the former judgment was a bar to the maintenance of this action, and that the court erred in its instruction in reference to damages. The judgment rendered in favor of plaintiff and wife in the former suit was solely for the damages resulting to the wife in consequence of the injuries received by her. She was the meritorious cause of the action, and the husband was merely joined under the provision of the statute to enable her to sue. But the damages there were strictly confined to her personal injuries, and the expenses incurred by the husband, and loss of service which constitute the foundation of this action were not in that case. In some of the New England States, under the provisions of statutes regulating the subject, it is held that but one action can be maintained. Those statutes permit all the damages incident to and growing out of the injury to be recovered in the same suit. They provide for but one action. But in the other States, where no such statutory regulations exist, a contrary doctrine is held. In the case of *McKinney v. Western Stage Co.* (4 Iowa, 420), the court says: "We suppose that at common law the rule is well settled, that for an injury to the person of the wife during coverture, by battery, or to her character by slander or any such injury, the wife must join with the husband in the suit. When, however, the injury is such that the husband re-

ceives a separate loss or damage, as, if in consequence of the battery, he has been deprived of her society, or has been put to expense, he may bring a separate action in his own name. *Barnes v. Hurd*, 11 Mass. 59; *Lewis v. Babcock*, 18 Johns. 443; 2 Saund. Pl. & Ev. 568; and this rule we do not understand to be changed by the code."

The Indiana Court holds, also, that the established doctrine is, that for a tort committed upon a wife, two actions will lie, one by the husband alone for the loss of service, expenses, &c., and the other by the husband and wife for the injury to the person. (*Rogers v. Smith*, 17 Ind. 323; *Long v. Morrison*, 14 Ind. 595; *Ohio & M. R. R. Co. v. Tindall*, 13 Ind. 366; *Boyd v. Blaidell*, 15 Ind. 73.)

In the case of *Fuller v. Naugatuck R. R. Co.* (21 Conn. 557), it was said that it was clear that the plaintiffs could not recover for the wife's personal injury and also for the expenses of her cure in the same action. On the former ground of damages, the husband would have no interest, while the latter would accrue to him alone, and so the two claims would be incompatible with each other. The same principle has been often adjudged in different cases and laid down in elementary treatises. (*Reeves Dom. Rel.* 291; *Whitney v. Hitchcock*, 4 Denio, 461; *Cowden v. Wright*, 24 Wend. 429; *Bartley v. Ritchtmeyer*, 4 N. Y. 38; *Klingman v. Holmes*, 54 Mo. 304.)

We think there can be no doubt respecting the maintenance of the action, and that there is no bar in consequence of the previous recovery. On the question of damages the court instructed the jury, that if they found for the plaintiff they should assess his damages at such sum, as was shown by the evidence would compensate him for the expenses he had necessarily incurred, in nursing and taking care of his wife for the time she was diseased and disabled on account of the injury she had sustained in falling over the embankment, including compensation for his services in waiting upon her, doctor's bills, and costs of medicines and also for the loss of her services directly resulting from the injury. The only serious objection made to this instruction is, that it allows the plaintiff to recover compensation for his services in waiting upon his wife during her illness. Under all the circumstances surrounding this case, I think the instruction was right. The evidence shows that the wife's thigh bone was broken by the fall; that for two months she was so utterly helpless that her husband had to be constantly at her bedside and assist her even to move. During all this time he did not take off his clothes, as his attentions were required to be unceasing and unremitting. The husband then had to neglect all his business to perform this painful duty, and if he had not done it in person, he would have been under the necessity of hiring some one to do it in his stead. In this aspect of the case therefore, I think the instruction was justified.

[Omitting remainder of opinion.]

Judgment affirmed.

SECTION XVIII.

Action for Criminal Conversation.

BIGAOUETTE v. PAULET.

1883. 134 *Massachusetts*, 123.

TORT in four counts. The first count was for seduction of the plaintiff's wife; the second and fourth were for assaults upon her; and the third was for a rape: whereby the plaintiff lost her comfort, assistance, society, and benefit. Writ dated April 9, 1877. Trial in the Superior Court, before ROCKWELL, J., who allowed a bill of exceptions, in substance as follows:

The only witnesses were the plaintiff and his wife. The wife testified that the plaintiff was a workman in the factory of the Smith American Organ Company, in a subordinate capacity, under the defendant, and that the parties were in the habit of visiting each other occasionally with their wives; that on some occasions, previously to July 5, 1876, the defendant told the plaintiff's wife that he would turn her husband away from the factory if she refused to receive the defendant's visits; that on July 5, 1876, the defendant violently and forcibly ravished her; that he also immediately showed her a pistol, and threatened to shoot her if she should ever tell her husband; that she was at that time four months pregnant with child; that her child was born on December 11, 1876; that on December 16, 1876, she first told her husband of what had occurred between her and the defendant, and three days afterwards the plaintiff was discharged from the factory by the defendant; that shortly after July 5, 1876, the plaintiff saw black and blue marks on his wife's arms and legs, and observed that she was ill; that she had no physician, and they kept no servant to assist her; and that she attended to and performed her ordinary domestic duties in her husband's family from the time of the assault up to the time of her confinement, but that her performance of these duties was attended with pain and difficulty to herself. The plaintiff also testified to some of the above facts, and then rested his case.

The defendant contended, the foregoing being all the material testimony in the case, that there was not sufficient evidence of a loss of the wife's services to enable the plaintiff to maintain this action.

The judge ruled that, as there was no evidence to support the count charging the defendant with seducing the plaintiff's wife, and as the evidence applicable to the counts for assault and rape proved that no loss of service was caused to the plaintiff, the action could not be maintained; and directed a verdict for the defendant. The plaintiff alleged exceptions.

The case was argued at the bar, in November, 1878, by *A. Russ & H. B. Sargent, Jr.*, for the plaintiff, and by *W. P. Harding*, for the defendant; and was afterwards submitted on briefs by the same counsel.

W. ALLEN, J. The plaintiff cannot maintain this action for an injury to the wife only; he must prove that some right of his own in the person or conduct of his wife has been violated. A husband is not the master of his wife, and can maintain no action for the loss of her services as his servant. His interest is expressed by the word *consortium*, — the right to the conjugal fellowship of the wife, to her company, coöperation, and aid in every conjugal relation. Some acts of a stranger to a wife are of themselves invasions of the husband's right, and necessarily injurious to him; others may or may not injure him, according to their consequences, and, in such cases, the injurious consequences must be proved, and it must be shown that the husband actually lost the company and assistance of the wife. This is illustrated in the statement of injuries to a husband in 3 Bl. Com. 139, 140, where such injuries are said to be principally three: abduction, or taking away a man's wife; adultery, or criminal conversation with her; and beating or otherwise abusing her. The first two are of themselves wrongs to the husband, and his remedy is by action of trespass *vi et armis*. In regard to the others, the author's words are, "If it be a common assault, battery, or imprisonment, the law gives the usual remedy to recover damages, by action of trespass *vi et armis*, which must be brought in the names of the husband and wife jointly: but if the beating or other maltreatment be very enormous, so that thereby the husband is deprived for any time of the company and assistance of the wife, the law then gives him a separate remedy by an action of trespass, in nature of an action upon the case, for this ill usage, *per quod consortium amisit*; in which he shall recover a satisfaction in damages." He states, as one of the circumstances affecting the damages in an action for adultery, "the seduction or otherwise of the wife, founded on her previous behavior and character."

It is usual in actions for criminal conversation to allege the seduction of the wife, and the consequent alienation of her affections, and loss of her company and assistance, and sometimes of her services; but these are matter of aggravation, except so far as they are the statement of a legal inference from the fact itself, and actual proof of them is not necessary to the husband's right of action. The loss of the *consortium* is presumed, although the wife may have herself been the seducer, or may not have been living with the husband. A husband who is living apart from his wife, if he has not renounced his marital rights, can maintain the action, and it is not necessary for him to prove alienation of the wife's affection, or actual loss of her society and assistance. See *Chambers v. Caulfield*, 6 East, 244; *Wilton v. Webster*, 7 C. & P. 198; *Yundt v. Hartrunft*, 41 Ill. 9. The essential injury to the husband consists in the defilement of the marriage bed, — in the invasion of his exclusive right to marital intercourse with his wife, and to beget his

own children. This presumes the loss of the *consortium* with his wife, of comfort in her society in that respect in which his right is peculiar and exclusive. Although actions of this nature have generally been brought where the alienation of the wife's affections, and actual deprivation of her society and assistance, have been the prominent injury to the husband, yet it is plain that the seduction of the wife, inducing her to violate her conjugal duties, and the injuries arising from that, are not the foundation of the action. The original and approved form of action is trespass *vi et armis*, and, though this form was adopted when the act was with the consent of the wife, it was for the reason, as given by Chief Justice Holt, that "the law indulges the husband with an action of assault and battery for the injury done to him, though it be with consent of his wife, because the law will not allow her a consent in such case to the prejudice of her husband, because of the interest he has in her." *Rigaut v. Gallisard*, 7 Mod. 78; 2 Ld. Raym. 809; Holt, 50. See also Bac. Ab. Trespass, C, 1; and Marriage, F, 2; 2 Chit. Pl. (13th Am. ed.) 855; Reeves Dom. Rel. 63. The fact that trespass, and not case, was the form of action, even when the wrong was accomplished by the seduction of the wife, for the reason that the wife was deemed incapable of consent, and "force and violence were supposed in law to accompany this atrocious injury," indicates that the cause of action arose from acts committed upon the person of the wife, and not from influences exerted upon her mind, — that the corrupting of the body rather than the mind of the wife was the original and essential wrong to the husband.

We think that this action may be maintained upon the evidence offered, not for the actual loss of comfort, assistance, society, and benefit, alleged in the second and fourth counts as consequences of the assaults set forth in them, but for the loss of the *consortium* with the wife which is implied from criminal conversation with her, whether with or against her will.

Exceptions sustained.

SECTION XIX.

Action for Alienating Affection of Spouse.

WINSMORE v. GREENBANK.

1745 *Willes*, 577.¹

AFTER verdict for the plaintiff, the defendant's counsel moved for a new trial on grounds which the court *held* insufficient.

They then moved in arrest of judgment.

The declaration contained four counts. The first stated that on the 1st of January, 1741, Mary, then, and until the 24th of December, 1742, being the wife of the plaintiff (but since deceased) unlawfully, and without his leave and against his consent, departed and went away from him, &c., and lived and continued absent and apart from him from thence until and upon the 8th of August, 1742, and during the said time that the said Mary so lived and continued absent, a large estate, both real and personal, to the value of £30,000 was devised to her by W. Worth, D. D., her late father, for her sole and separate use, and at her sole and separate disposal; that thereupon she was desirous of being, and intended to be again reconciled to the plaintiff and to live and cohabit with him, whereby he would have had and received the benefit and advantage of the said real and personal estate (the plaintiff being willing and desirous to be reconciled, &c.), yet the defendant knowing the said premises and having notice of the said Mary's intention, but contriving to injure the plaintiff, and to prevent Mary the wife from being reconciled to him, &c., and to prevent the plaintiff receiving any advantage from the said real and personal estate, &c., on the 8th of August, 1742, *unlawfully and unjustly persuaded, procured and enticed* the said Mary to continue absent and apart from the plaintiff, and to secrete, hide, and conceal herself from the plaintiff, *by means of which persuasion, procuration, and enticement*, the said Mary from the said 8th of August, 1742, until the time of her death on the 24th of December, 1742, *continued absent* and apart, and secreted herself, &c.; *whereby the plaintiff during all that time totally lost the comfort and society of his said wife, and her aid and assistance in his domestic affairs, and the profit and advantage that he would and ought to have had of and from the said real and personal estates, &c., and was put to great charges and expenses in endeavoring to find out and gain access to his said wife in order to persuade and procure her to be reconciled to him.*

The defendant pleaded not guilty; and the jury found a verdict for

¹ Only so much of the report is given as relates to the first count. — Ed.

the plaintiff on the three first counts, and gave £3,000 damages, and a verdict for the defendant on the last.

This case was argued on the 18th and 26th of November, 1745, and the 29th of January following, by *Skinner* and *Willes*, King's Serjeants, and *Draper* and *Hayward*, Serjeants, for the defendant, in support of the motion in arrest of judgment, and by *Prime* and *Birch*, King's Serjeants, and *Bootle*, Serjeant, for the plaintiff; and on the 1st of February following the rule to arrest the judgment was discharged.

WILLES, Lord Chief Justice, delivered his opinion to the following effect:

Several objections have been taken by the defendant to this declaration in arrest of judgment; two general ones, and three to the particular penning of the declaration. I admit the rules laid down in most of the cases that were cited, and therefore shall have occasion to mention only a few of them, because they are not applicable to the present case.

The first general objection is, that there is no precedent of any such action as this, and that therefore it will not lie; and the objection is founded on Lit. s. 108, and Co. Lit. 81 *b*, and several other books. But this general rule is not applicable to the present case; it would be if there had been *no special action on the case* before. A special action on the case was introduced for this reason, that the law will never suffer an injury and a damage without a remedy: but there must be new facts in every special action on the case.

The second general objection is, that there must be *damnum cum injuria*; which I admit. I admit likewise the consequence, that the fact laid before *per quod consortium amisit* is as much the gist of the action as the other; for though it should be laid that the plaintiff lost the comfort and assistance of his wife, yet if the fact that is laid by which he lost it be a lawful act, no action can be maintained. By *injuria* is meant a *tortious* act: it need not be wilful and malicious; for though it be accidental, if it be *tortious*, an action will lie.

This rule therefore being admitted, the only question is whether any such injury be laid here; and this rule will properly come to be considered under the several objections made to the particular counts; for if any of them hold, then no injury is laid. I admit also that as the verdict is on three counts and the damages are entire, if either of the counts be bad, the judgment must be arrested.

The principal objections were to the first count, and they were three:

1st, That *procuring, enticing, and persuading*, are not sufficient, if no ill consequence follows from it;

2dly, That *unlawfully and unjustly* will not help the case; but the particular methods made use of should have been stated by which the defendant procured, &c., otherwise this is leaving the law to a jury;

3dly, That no notice or request is laid, which is necessary in the

case of the continuance, though it be not necessary if the defendant had at first persuaded her.

To the first there were two answers :

1st, That here is a consequence laid, that by means thereof the plaintiff lost the comfort and society of his wife, and the profit and advantage of her fortune, &c. ;

2dly, Whether, "enticing" goes so far or not I will not nor need determine, because "procuring" is certainly "persuading with effect." I need not cite any authorities for this ; because every one who understands the English language knows that this is the common acceptation of that word.

2dly, But, to be sure, it must be *an unlawfully procuring*, and that brings me to the second objection. It is not necessary to set forth all the facts to shew how it was unlawful ; that would make the pleadings intolerable, and would increase the length and expense unnecessarily. It was said, however, that at least it was necessary for the plaintiff to add "by false insinuations : " but it is not material whether they were true or false ; if the insinuations were true, and by means of those the defendant persuaded the plaintiff's wife to do an unlawful act, it was unlawful in the defendant.

In answer to the objection that this is leaving the law to the jury, it must be left to them in a variety of instances where the issue is complicated, as, *burglariter, felonice, proditorie, devisavit vel non, demisit vel non*. But the judge presides at the trial for the very purpose of explaining the law to the jury, and not to sum up the evidence to them.

As to the distinction between the beginning and continuance of a nuisance by building a house that hangs over or damages the house of his neighbor, that against the beginner an action may be brought without laying a request to remove the nuisance, but that against the continuer a request is necessary, for which *Penruddock's Case*, 5 Co. 100, 101, was cited, and many others might have been quoted, the law is certainly so, and the reason of it is obvious. But that reason does not extend to the present case ; because every moment that a wife continues absent from her husband without his consent, it is a new tort, and every one who persuades her to do so does a new injury and cannot but know it to be so.

Several arguments were urged and several cases were cited on both sides of the question, whether defects in this declaration were or were not aided by the verdict : but I shall not take notice of them, because I am of opinion that there are no defects to be cured, and that the declaration would have been good even on a demurrer. Had the words "unlawfully and unjustly" been omitted, this question might have been material, because it is lawful in some instances for the wife to leave the husband : but as the declaration is framed, it is not necessary to enter into the consideration of that question. Many observations were likewise made on the *quantum* of the damages given by the jury,

and it was said that it was uncertain whether or not the husband had sustained any: those were proper observations on the motion for a new trial (which has been already disposed of) but cannot have any weight on this motion in arrest of judgment, where every thing laid in the declaration must be taken to have been proved. I can see no reason to arrest this judgment, and therefore I am of opinion that the rule must be discharged.

Mr. J. ABNEY and Mr. J. BURNETT gave their opinions *seriatim*, agreeing with the LORD CHIEF JUSTICE.

Rule discharged. JTT

Stop ✓

BENNETT v. SMITH.

1856. 21 *Barbour* (N. Y. Supreme Court), 439.

APPEAL by the defendants, from a judgment rendered at a special term, after a trial at the circuit. The action was brought to recover damages against the defendants, for enticing away the plaintiff's wife; one of the defendants being the father of the wife.

By the Court, T. R. STRONG, J. The marriage in this case was valid, although the female was between fifteen and sixteen years of age, and the marriage was without the consent and against the will of her parents. By the common law, infants may marry—males at the age of fourteen and females at twelve—and the consent of parents is not necessary to the validity of the marriage. (1 Black. Com. by Chitty, 348, 9, marginal paging 436, 7; 2 Kent's Com. 78, 9, note b, 85; Bright's Hus. & Wife, 4, § 17; *Parton v. Hervey*, 1 Gray's Rep. 119.) We have a statute in this State, authorizing the court, by a sentence of nullity, to declare void in certain cases, a marriage where the female was, at the time of the marriage, under the age of fourteen, (Laws of 1841, chap. 257,) but with that exception the rules of the common law above stated remain unchanged, and are in full force here.

The marriage being valid, the ordinary legal consequences of marriage followed—the husband and wife were one person, and he was entitled to her society and services. The authority of the parents over the daughter, and their right to her custody and services, were held subject to her right to contract marriage, and upon the marriage were suspended. This must be so on principle, as the continuance of the power and rights of the parents would be wholly inconsistent with that relation and the rights thereby acquired by the husband.

It is well settled that a husband may maintain an action for enticing away his wife, or inducing her to live apart from him; and in *Hutcherson v. Peck*, (5 John. 196,) the opinion was expressed by all the members of the court, that a suit by a husband against his wife's father for that cause, would lie. The ground of action in such a case is, that the husband has a right to the comfort and assistance of his wife, and

that by procuring her to leave, or continue away from him, that right is violated and he sustains an injury. The wife owes to the husband the duty of living with him, and seeking to promote his interests and happiness, and by preventing the performance of that duty a wrong is done to him, involving a pecuniary loss as well as a loss of peace and comfort in the marriage relation. Whoever is the wrongdoer, whether the father of the wife, or any other person, he should be subject to an action for damages by the husband.

Merely allowing, however, the wife to come or remain in his house by a stranger, and much less her father, from good motives, will not give to the husband a right of action. Motives of humanity will protect a party from liability for such acts, although done against the will and even the express prohibition of the husband. (*Philips v. Squire*, Peake's N. P. Cas. 82; *Schuneman v. Palmer*, 4 Barb. 225.) The exercise, by a person, of ordinary hospitality, simply in permitting a mother-in-law to reside in his family, although forbidden by the husband, will not sustain an action. (*Turner v. Estes*, 3 Mass. R. 317.) In such, and all similar cases, something further, tending to prevent or dissuade the wife from living with her husband, is requisite to a cause of action. But, as a general rule, slight acts of that character will be sufficient.

In respect to what facts will support an action by a husband for depriving him of his wife, there is, in principle, a clear distinction between the cases where the action is against a parent of the wife, and where it is against a stranger. Parents are under obligations, by the law of nature, to protect their children from injury and relieve them when in distress; and their natural affection for their offspring dictates and prompts to such protection. This is recognized by the common law, and is the foundation of the rules which allow parents to do some things in respect to and in behalf of their children which are not allowed to be done by others, and which in some cases mitigate crimes committed by parents to which they are excited by injuries to their children. Blackstone says, on the subject of this duty of protection, that it is a "natural duty, but rather permitted than enjoined by any municipal laws; natural in this respect, working so strongly as to need rather a check than a spur. A parent may, by our laws, maintain and uphold his children in their lawsuits, without being guilty of the legal crime of maintaining quarrels. A parent may also justify an assault and battery in defense of the persons of his children; nay, where a man's son was beaten by another boy, and the father went near a mile to find him, and there revenged his son's quarrel by beating the other boy, of which beating he afterwards unfortunately died, it was held not to be murder, but manslaughter merely. Such indulgence does the law show to the frailty of human nature, and the workings of parental affection." (1 Bl. Com. by Chitty, 371, marginal paging 454.) This duty of protection, in reason and justice, extends to wrongs done or threatened by a husband as well as by other per-

sons, and the acts of parents are entitled to be regarded in the same spirit in such a case as in others. Where the conduct of a husband is such as to endanger the personal safety of his wife, or is so immoral and indecent as to render him grossly unfit for her society, so much so that she would be justified in abandoning him, her parents ought to, and I have no doubt have, the right, not only to receive her into, and allow her the comforts of their house, which even a stranger may do in such a case, but also to advise her to come and remain there. No parent with ordinary parental feelings will, under such circumstances, hesitate to go so far for the relief of his children, and the common law will not, in my opinion, hold him responsible to the husband in damages for such conduct. And the same doctrine, in my judgment, is applicable to a case where the advice is given by a parent in the honest belief, justified by information received by him, that such circumstances exist, although the information may subsequently prove to have been unfounded. It is enough for his protection that he was warranted in such belief, and acted from pure motives. The opinions delivered by a majority of the court in the case of *Hutcheson v. Peck*, before cited, go very far in support of these views. That was an action by a husband against his wife's father, for enticing away the wife, and each of the five judges delivered an opinion at length. Kent, Ch. J., after alluding to the relationship between the defendant and the plaintiff's wife and briefly remarking upon the affection and obligation of parents to their children, says, "I should require, therefore, more proof to sustain the action against the father than against a stranger. It ought to appear either that he detains the wife against her will, or that he entices her away from her husband from improper motives. Bad or unworthy motives cannot be presumed. They ought to be positively shown, or necessarily deduced from the facts and circumstances detailed. This principle appears to me to preserve, in due dependence upon each other, and to maintain in harmony, the equally strong and sacred interests of the parent and the husband. The *quo animo* ought then, in this case to have been made the test of inquiry and the rule of decision." The rule here stated by the learned jurist is in accordance with justice, and I think is the law. ↵

In the present case, looking at the entire charge to the jury, the question as to a right of action was, at the trial, made to turn upon the question whether the defendants, after the wife was taken to the house of her parents, either by persuasion or force prevented her returning to her husband. The justice instructed the jury in substance, that the parents were justified in the exercise of their parental authority, in compelling the wife to go with them to their house, notwithstanding the declaration of the husband that they were married, and that the parental power over the wife continued until the parents, by the exercise of reasonable diligence, could ascertain in some other mode whether a marriage had in fact taken place; and that the other persons acting in aid of, and by the authority of the parents, were, in respect to that

part of the case, justified alike with the husband. This, upon the evidence, disposed of the case against the plaintiff as to all that part of it prior to the wife being brought back to her father's house. The justice further advised the jury, in substance, that if afterwards the defendants, either by persuasion or force, prevented her returning to her husband, they were liable, and in respect to the father, that if he persuaded the wife to stay away from her husband, such persuasion was an unlawful act; that the law imputes an unlawful purpose to all persons doing an unlawful act; that parents have no right to advise or persuade a daughter to separate from, or stay away from her husband; and that if the father had done either, he was liable in this action, without reference to his motives or intentions. The same rule of liability was applied in deciding questions of evidence in the progress of the trial. The counsel for the defendants, in a series of offers, proposed to prove, that in the year 1851, and up to the time of the marriage, which was the 29th of August, 1852, the plaintiff was a habitual drunkard, and continued to be such up to the time of the trial; that his habits of drunkenness were known to the defendants, and constituted one ground of objection to the daughter living with the plaintiff; that he was in the habit up to the time of the trial of frequenting houses of ill-fame, and having illicit intercourse with abandoned women; that he was, previous and subsequent to the marriage, profane, vulgar and lascivious; and publicly boasted of his illicit intercourse with abandoned women, and of his frequenting houses of ill-fame; and that this was known to the defendants: and that the plaintiff, prior to and at the time of the marriage, had no pecuniary means or ability to support a family, was thriftless, idle and lazy, and followed no regular business. These offers were severally overruled and the evidence was rejected.

If the views I have already expressed are correct, the learned justice erred in his instruction to the jury, that the father was liable if he advised the wife to stay away from her husband without regard to his motives; and also in excluding the evidence offered. The matters proposed to be proved, if established, and the father was influenced by them in advising the daughter to remain away from her husband while his habits of drunkenness and gross immorality and indecency continued, would have fully justified him in giving that advice, and so far as related to that act, constituted a complete defense to him in the action. The daughter was under sixteen — she had been taken away or left her father's house secretly and married without his consent or knowledge, and the plaintiff, her husband, if what was offered to be proved in regard to his habits and conduct was true, was entirely unworthy of, and unfit for, the society of a virtuous woman; and it was the right and duty of the father, in discharging his obligation to protect her, to advise her to remain with her parents, and under their care, while the unfitness of the husband continued. The law is not so unreasonable as to regard mere advice in such a case, prompted by parental love, as a wrong, entitling the husband to damages. The fact that

a husband is without pecuniary means, will not warrant his wife in leaving him, or her parents in advising her to do so. As was observed by the circuit judge at the trial in the case of *Hutcheson v. Peck*, the poverty of the husband in such a case is rather an aggravation, for it is the duty of the wife to live with him and assist him in improving his affairs.

But if a cause of action was proved, I am satisfied that the evidence which was excluded was admissible upon the question of damages. It was offered upon that question as well as on the main issue. The rejection of this evidence assumed that a habitual drunkard, a frequenter of brothels, and so debased as to boast of illicit intercourse with prostitutes, was entitled to the same measure of damages for depriving him of his wife, as a man of good habits and fair character. No argument is necessary to refute such a position. The bare statement of it is sufficient. The injury complained of is analogous in character to an injury to a husband by criminal conversation with his wife. It consists, in each case, in alienating the wife's affections and destroying the comfort he had from her company. They differ in degree, but the rule of damages, in respect to each, as to the point under consideration, must be the same. In the action for criminal conversation, it is said in Buller's N. P. 26, 27, the damages are properly increased or diminished by the particular circumstances of each case, and among other circumstances are mentioned the rank and quality of the plaintiff, and that the plaintiff kept company with other women. Phillips, in his treatise on Evidence, (vol. 2, p. 213,) in giving the circumstances in extenuation, and to lessen the damages in an action for criminal conversation, says they will vary with every varying case, and he specifies, among others, the husband's profligate habits and his criminal connection with other women. See also, to the same effect, *Bromley v. Wallace*, (4 Esp. N. P. Cas. 257) ; Stephens N. P. C. 8, 27 ; *Sanborn v. Nelson*, (4. N. Hamp. Rep. 501). In *Foot v. Tracy*, (1 John, 51,) Kent, Ch. J., says, that in an action for criminal conversation, it is the practice to inquire into the moral character and behaviour of the husband himself, who is a party to the record. So also the injury sustained by a breach of a promise to marry is of a similar nature to that in an action like the present, and a like rule in regard to the plaintiff's character and conduct being a proper subject of consideration on the question of damages, must prevail in each. In *Leeds v. Cook*, (4 Esp. N. P. Cas. 256,) which was an action for breach of promise of marriage, Lord Kenyon says, if the plaintiff appeared to be of gross manners and destitute of feeling ; as he complained by his action of an injury in the loss of the society of a woman, which he appeared never to have valued, and the pleasures of which society he seemed little calculated to taste, the jury should take it into consideration. In *Willard v. Stone*, (7 Cowen, 22,) which was also an action for a breach of a promise to marry, improper conduct of the plaintiff after the breach, and after all intercourse between the parties had ceased, was adjudged admissible in

mitigation of damages; and in *Palmer v. Andrews*, (7 Wend. 142,) which was for a like cause, the doctrine was stated and applied, that evidence of grossly indecent conduct of the plaintiff, either before or after the breach, was proper in mitigation. (See also *Boynton v. Kellogg*, (3 Mass. Rep. 189). The books therefore fully accord with the dictates of reason and justice, and establish the principle, that the evidence in question was admissible to reduce the damages.

I am also of the opinion that the declarations of the wife within a few days after the marriage, expressing her wishes in relation to living with the plaintiff as his wife, should have been received. The main question in the case was, whether the defendants prevented the return of the wife to her husband during that period; and, in connection with other circumstances tending to prove that she was not then under constraint, her declarations were admissible as part of the *res gestæ*. (1 Greenl. Ev. § 102; 1 Phil. Ev. 231, 234; 2 id. 212; 1 Steph. N. P. 27; *Hadley v. Carter*, 8 N. Hamp. R. 40.)

My conclusion is, that a new trial should be granted, with costs to abide the event.

New trial granted.

[MONROE GENERAL TERM, March 3, 1856. JOHNSON, T. R. STRONG, and WELLES, Justices.]

HARTPENCE v. ROGERS.

1898. 143 *Missouri*, 623.¹

IN the Supreme Court, Division One.

Action for damages for alienating the affections of plaintiff's wife, and wrongfully causing her to abandon him. The defendant was not a relative of the wife. There was a verdict for plaintiff. Defendant appealed.

Crosby Johnson, for appellant.

O. J. Chapman, for respondent.

WILLIAMS, J.

2. The first, third, and fourth instructions for plaintiff contained a direction to the jury to find for him, if they believed from the evidence that defendant intentionally persuaded plaintiff's wife to separate and remain apart from him. These instructions contain other matters, which will be noticed later, but all of them include in substance the above direction. They are almost exact copies of those approved in *Modisett v. McPike*, 74 Mo. 636. It is argued by appellant that the jury, by these instructions, was authorized to return a verdict against defendant, upon the proof alone of the fact that he persuaded plaintiff's wife to

¹ Only so much of the case is given as relates to a single point. The arguments are omitted. — ED.

leave him and separate herself from him, without reference to defendant's motives in so doing. It is said that a wife may have a good cause to abandon her husband and that a third party, in no manner related to her, may, from the best motive, persuade her to do so. This court answered a similar contention in the following language: "The wife may have a just cause for separation or divorce, but she may elect to abide by her situation and remain with her husband nevertheless. If she chooses to do so, no stranger has the right to intermeddle with the domestic and marital relations of husband and wife and if he voluntarily does so, he is amenable for the consequences. . . . No one unasked, especially a stranger, has the right to volunteer his advice or protection and if he does so he is amenable. 'It is one thing to actively promote domestic discord, but quite another to harbor, from motives of kindness and humanity, one who seeks shelter from the oppression of her own lawful protector.' It has been well said that 'such conduct, whatever the motive, is exceedingly perilous on the part of a stranger, generally open to misconstruction and never to be encouraged.'" *Modisett v. McPike*, 74 Mo. 646.

The principle announced in the instructions complained of, and in almost the same language, met with the approbation of the entire court in the case cited. We have no disposition to depart from that ruling. It is a safe rule to lay down, as this court has done, that a husband makes a *prima facie* case against a stranger, when he shows that such stranger voluntarily and unasked intermeddled with his domestic affairs, and intentionally urged, persuaded, and induced his wife to desert and abandon him, and to refuse to live with him; and in the absence of anything in the evidence, as in this case, to justify or excuse such conduct, the plaintiff's right to a recovery, upon proof of such facts, is established, and the jury was properly so instructed. *Modisett v. McPike*, *supra*.

The issues submitted in the instructions were included in the allegations of the petition. The fact that more was alleged than it was necessary for plaintiff to prove, in order to entitle him to a verdict, could not prevent his recovery, where he averred and proved enough to make out his case. *Campbell v. Railroad*, 121 Mo. 340; *Radcliffe v. Railroad*, 90 Mo. 127.

[Opinion on other points omitted.]

Judgment affirmed.

BRACE, P. J., and ROBINSON, J., concur.

TASKER v. STANLEY.

1891. 153 *Massachusetts*, 148.¹

HOLMES, J. These are actions for procuring and enticing the plaintiff's wife to live separately from him. They are not actions of the type of *Lynch v. Knight*, 9 H. L. Cas. 577, brought for a slander in consequence of which his wife left him, but they are brought for persuasions which may have been based wholly upon the truth. That is all that is alleged in the declarations, and, so far as appears from the bill of exceptions, there was no evidence offered that the defendants spoke any falsehoods, or that their conduct was unlawful for any other reason than its tendency to produce a separation. *Winsmore v. Greenbank*, Willes, 577, 583.

True statements and honest advice would have done no harm but for the subsequent act of the wife, an independent and responsible person. The defendants had a right to deny their intent to bring about that act. See *Robbins v. Fletcher*, 101 Mass. 115, 117; *Snow v. Paine*, 114 Mass. 520; *Commonwealth v. Damon*, 136 Mass. 441, 449. And probably they would not be liable for it unless they intended it. See *Tutein v. Hurley*, 98 Mass. 211; *Hastings v. Stetson*, 126 Mass. 329; *Jones v. Goodwillie*, 143 Mass. 281; *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47, 49; *Elmer v. Fessenden*, 151 Mass. 359, 362; *Vicars v. Wilcocks*, 8 East, 1, 3; *Ward v. Weeks*, 7 Bing. 211, 215; *Radley v. London & Northwestern Railway*, 1 App. Cas. 754, 759; *Milwaukee & St. Paul Railway v. Kellogg*, 94 U. S. 469, 475; *Cuff v. New-ark & New York Railroad*, 6 Vroom, 17, 30, *et seq.*

If the defendants did intend to induce a separation, they had a right to show that their advice was given honestly, with a view to the welfare of both parties. For a married woman to leave her husband without cause is not a great crime. It is legal if with his consent, and if against his will it is only illegal in the sense that, if she keeps away from him for three years, he may get a divorce. A married woman must be supposed to be capable of receiving advice to separate from her husband without losing her reason or responsibility. Considering the present state of the law as to the act advised, (an important consideration, *State v. Goode*, 1 Hawks, 463, 464,) and as to the person to whom the advice is given, it is proper to allow a larger privilege than in the case of false statements. Good intentions are no excuse for spreading slanders. But in order to make a man who has no special influence or authority answerable for mere advice of this kind because it is followed, we think that it ought to appear that the advice was not honestly given, that it did not represent his real opinions, or that it was given from malevolent motives; and so are all the cases. *Walker v. Cronin*,

¹ Statement omitted. — Ed.

107 Mass. 555, 564, 566 ; *Barnes v. Allen*, 1 Abb. (N. Y. App.) 111 ; *Hutcheson v. Peck*, 5 Johns. 196 ; *Modisett v. McPike*, 74 Misso. 636, 648 ; *Rinehart v. Bills*, 82 Misso. 534, 537 ; Pollock, Torts (2d ed.), 479, 480 ; *Bowen v. Hall*, 6 Q. B. D. 333, 338, 344 ; *Lumley v. Gye*, 2 El. & Bl. 216.

[Omitting opinion on another point.]

Exceptions overruled.

SECTION XX.

*Whether Husband Has Right to Chastise Wife, or to Deprive
Wife of Liberty.*

FULGHAM v. THE STATE.

1871. 46 *Alabama*, 143.¹

APPEAL from Circuit Court of Greene.

Tried before HON. CHARLES PELHAM.

This was an indictment of the husband for an assault and battery upon his wife. The indictment charges that before the finding thereof, "George Fulgham assaulted and beat his wife, Matilda Fulgham, against the peace," &c. Appellant went to trial on plea of not guilty, and was convicted and fined.

From the bill of exceptions, it appears that the accused was chastising one of his children, when the wife remonstrated, thinking the punishment excessive. The child ran, pursued by the father, and both followed up by the wife. When the wife came up with her husband, he struck her twice on the back with a board, and she returned the blows with a switch. The blows inflicted on the wife made no permanent impression. Both were high tempered, and were emancipated slaves, and were husband and wife.

This being all the evidence, the court charged the jury that "if they believed that defendant struck his wife with a board, as described in the evidence, in anger, and not in self-defense, he was guilty of an assault and battery; that words of provocation and abuse by the wife, if she used any at the time of the fight, would, under the statute of Alabama, be in justification or extenuation, as they might see fit." The defendant excepted to this charge, and requested the court to charge the jury that "a husband cannot be convicted of a battery on his wife unless he inflicts a permanent injury, or uses such excessive violence or cruelty as indicates malignity or vindictiveness." This charge the court refused to give, and "further charged that the proposition that a husband could moderately chastise his wife, was a relic of barbarism, and no part of the law of Alabama, although it might be of North Carolina, or Mississippi. To the refusal to give the charge asked, and to the remark above, defendant excepted."

The charges given, and the refusal to give the charge asked, are now assigned as error.

R. Crawford, for appellant.

Attorney-General, contra.

¹ Arguments omitted. — ED.

PETERS, J. This is a criminal prosecution by indictment upon a charge of assault and battery by the husband upon the person of the wife. The defense relied on by the accused is, that a husband may give his wife moderate correction in order to secure her obedience to his just commands.

This authority, on the part of the husband, to chastise the wife with rudeness and blows in order to coerce her obedience to his domestic commands, was not admitted in the age of Judge Blackstone, or as he says, "in the polite reign of Charles the Second," *except* among "the lower rank of the people, who were always fond of the old common law," by which "they claim and exert their *ancient privilege*," to give their wives "moderate correction," to secure subordination in the family. 4 Bl. Com. 444, 445, marg. page. It will be seen from this reference, that this eminent and classic commentator on the law of England confines this brutal and unchristian "privilege" wholly to the "lower rank of the people." The most zealous advocates of "wife-whipping" have never gone beyond this unhappy rank. It has never been contended that this liability to be corrected with blows and stripes was the law for the wives of all the people — of those of the higher as well as those of the lower rank. The language of the authority relied on by the learned counsel for the accused, clearly shows that there was a rank of the people excluded from its operation. Such partial laws cannot be enforced in this State. The law for one rank is the law for all ranks of the people, without regard to station. Judge Blackstone calls it merely an *ancient privilege*, and quotes no decided case, and possibly none such could then be found, which supports the privilege referred to by him, as an universal law. This distinguished author published his commentaries above one hundred years ago, when society was much more rude, out of the towns and cities in England, than it is at the present day in this country; and the exercise of a rude privilege there is no excuse for a like privilege here. If it was, the offense of witchcraft and sorcery, which were crimes at common law, and most cruelly punished against the voice of both reason and religion, might be indicted here. 4 Bl. Com. p. 60. Since then, however, learning, with its humanizing influences, has made great progress, and morals and religion have made some progress with it. Therefore, a rod which may be drawn through the wedding ring is not now deemed necessary to teach the wife her duty and subjection to the husband. The husband is therefore not justified or allowed by law to use such a weapon, or any other, for her moderate correction. The wife is not to be considered as ~~the~~ husband's slave. And the privilege, ancient though it be, to beat her with a stick, to pull her hair, choke her, spit in her face or kick her about the floor, or to inflict upon her like indignities, is not now acknowledged by our law. *Turner v. Turner*, 44 Ala. 437; *Goodrich v. Goodrich*, 44 Ala. 670; *Moyler v. Moyler*, 11 Ala. 620; *Saunders v. Saunders*, 1 Rob. Ec. R. 549. The husband may defend himself, his children, and those relations whom the law permits him to defend,

against the violence of the wife. 12 Ala. 587; 1 Bish. Cr. Law, 341. But in person, the wife is entitled to the same protection of the law that the husband can invoke for himself. She is a citizen of the State, and is entitled, in person and in property, to the fullest protection of its laws. Her sex does not degrade her below the rank of the highest in the commonwealth.

Speaking of the duty of the husband to the wife, a late expounder of the law of this great relation declares that he "is bound to love his wife and to bear with her faults, and if possible, by mild means to correct them." Schouler Dom. Rel. 59; 1 Bouv. Law Dict. 675, *Husband*; *Goodrich v. Goodrich*, 44 Ala. 670. This is the voice of the law, and the voice of politeness and humanity, and I think also the voice of religion, which is, after all, but pure and disinterested love. St. Paul's Epists. *ad Corinth.*, *ubique*.

Besides this, the constitution has wisely and justly extended the protective power of the State to all its people alike. Its shield is stretched out over the high and the low, the rich and the poor, the strong and the weak, the wise and the simple, the learned and the unlearned, and the good and the bad, without distinction of rank, caste, or sex. All stand upon the same footing before the law, "as citizens of Alabama, possessing equal civil and political rights and public privileges." And no special "privilege" to any rank of the people is allowed to exist in this State, because such a privilege is forbidden by the fundamental law. Const. Ala. 1867, Art. I. §§ 2, 32; *Dale v. Governor*, 3 Stew. 387. I therefore think that the common law of "wife whipping" among "the lower rank of people" in Great Britain, has never been the common law of this State. It is, at best, but a low and barbarous custom, and never was a law.

The husband may exercise over the wife "gentle restraint." 2 Kent, 181. And he may have security of the peace against the wife, and the wife against him. 4 Bla. Com. 445. And they may be indicted for assault and battery upon each other. *Bradley v. The State*, Walker R. 156. But beyond this, "the rule of love has superseded the rule of force." Schoul. Dom. Rel. 59.

There was, then, no error in the charge given, or in refusing the charge asked. Therefore, let the judgment of the court below be in all things affirmed.

PECK, C. J.. *dissenting*.

REGINA v. JACKSON.

1891. *Law Reports* (1891), 1 *Queen's Bench*, 671.¹

IN the Court of Appeal.

Argument on the return to a writ of *habeas corpus*, commanding Edmund H. Jackson to bring up the body of Emily E. M. Jackson, his wife, taken and detained in his custody.

[Application for a writ of *habeas corpus* had, in the first instance, been made to and refused by the Queen's Bench Division (CAVE and JEUNE, JJ.). The opinions then given are reported in 64 *Law Times*, New Series, pp. 679, 680.]

The husband made return to the writ, and affidavits were filed on both sides.

The facts were, in substance, as follows :

The marriage took place in 1887. A few days after the wedding, the husband started for New Zealand, as had been previously arranged. Upon his return, his wife refused to live with him, and he was denied personal access to her. Thereupon he sued for and obtained a decree for restitution of conjugal rights. His wife refused to obey this decree. Thereafter, on Sunday, March 8, 1891, the husband, assisted by two men, seized the wife just as she was leaving a church in company with her sister. They seized her in full view of the congregation coming out of church, forcibly separated her from her sister to whom she was clinging, and dragged her backwards into a carriage, her feet remaining outside until they were lifted into the carriage by one of the husband's assistants. Her arm was bruised in the struggle. The carriage was then driven to the husband's house, in which the wife was detained until she was brought up in obedience to the writ of *habeas corpus*. She had the free run of the house, but was not permitted to leave it, unless she chose to drive out with her husband, which she declined to do. While there she was not allowed to have verbal or written communication with her relatives. [Mrs. Jackson made no affidavit, as she had no opportunity, her solicitor having been refused access to her when he applied for it. 64 L. T. N. S. p. 681.]

Henn Collins, Q. C., and *Malcolm P. Douglas*, for the husband.

Finlay, Q. C., and *Forbes Lankester*, for the wife.

[At the conclusion of the arguments, Lord HALSBURY said: "We think we must see the lady herself, because she has had no communication with those who now represent her in court, so that we may find out whether she is acting as a free agent or under external influences."

"Their Lordships then saw Mrs. Jackson *in camera*, and afterwards delivered the following judgments:" 64 L. T. N. S. p. 682.]

¹ Statement abridged. Arguments omitted. — Ed.

LORD HALSBURY, LORD CHANCELLOR. The court has satisfied itself that, in refusing to go to and continue in her husband's house, Mrs. Jackson was acting of her own free will, and that she is not compelled or indeed, so far as present circumstances are concerned, induced by any one to refuse to continue in his house, and was not compelled to remain where she was before he removed her. I confess that some of the propositions which have been referred to during the argument are such as I should be reluctant to suppose ever to have been the law of England. More than a century ago it was boldly contended that slavery existed in England; but, if any one were to set up such a contention now, it would be regarded as ridiculous. In the same way, such quaint and absurd dicta as are to be found in the books as to the right of a husband over his wife in respect of personal chastisement are not, I think, now capable of being cited as authorities in a court of justice in this or any civilized country. It is important to bear this in mind, for many of the statements, which have been relied upon, of a more moderate character and less outrageous to common feelings of humanity, are bound up with these ancient dicta to which I refer. The only justification, as it appears to me, for such expressions as are found in some of the old books is that afforded by the free translation given to them by Hale, C. J., who suggests that "castigatio" may be taken to mean admonition merely. Whether the word will bear that translation in these passages I cannot say; but I am glad that some one even at that early period thought it inconsistent with the rights of free human creatures that such a power of personal chastisement of the wife should exist. I only mention the subject, because it appears to me that the authorities cited for the husband were all tainted with this sort of notion of the absolute dominion of the husband over the wife. The only case referred to in which it was decided, as a question of law in an abstract form, unaccompanied by circumstances which might import a qualification, that a husband had a right to the custody of his wife, was *Cochrane's Case*, 8 Dowl. 630. With regard to the proposition that the mere relation of husband and wife gives the husband complete dominion over the wife's person, apart from any circumstances of misconduct or any acts amounting to a proximate approach to misconduct on her part, which would give the husband a right to restrain her, none of the authorities cited appear to me to establish that proposition. I do not mean to lay it down as the law that there may not be some acts, acts of proximate approach to some misconduct, which might give the husband some right of physical interference with the wife's freedom, — for instance, if the wife were on the staircase about to join some person with whom she intended to elope, I could understand that there might be to some extent a right to restrain the wife. It is not necessary, however, on the present occasion to discuss that question any further than to say that I can understand that some authority on the part of the husband of such a nature and so limited might well be justified according to any system of reasonable law. We have to determine this case on the return to the

writ, which states in substance that, because the wife refused to live with the husband, he took her and has since detained her in his house, using no more force or constraint than was necessary to take her or to prevent her from returning to her relations. Such is the return by which he justifies the admitted imprisonment of this lady. I do not know that I can express in sufficiently precise language the distinction which has been suggested between "imprisonment" and "confinement." If there be any such distinction, I should find that in this case there was imprisonment. I do not find any denial in the return that the lady is kept in imprisonment in the husband's house. The return seems to me to be based on the broad proposition that it is the right of the husband, where his wife has wilfully absented herself from him, to seize the person of his wife by force and detain her in his house until she shall be willing to restore to him his conjugal rights. I am not prepared to assent to such a proposition. The Legislature has deprived the Matrimonial Causes Court of the power to imprison for refusal to obey a decree for the restitution of conjugal rights. The husband's contention is that, whereas the court never had the power to seize and hand over the wife to the husband, but only the power to imprison her as for a contempt for disobedience of the decree for restitution of conjugal rights, and even that power has been now taken away, the husband may himself of his own motion, if she withdraws from the conjugal consortium, seize and imprison her person until she consents to restore conjugal rights. I am of opinion that no such right exists or ever did exist. Moreover, assuming that sufficient authority existed for such a proposition, it is subject in any case to the qualification which I observe is always imported, that, where the wife has a complaint of or reason to apprehend ill-usage of any sort, the court will never interfere to compel her to return to her husband. This brings me to the particular circumstances of this transaction. I am prepared to base my judgment on the ground that the husband has no such authority as he claims; that no English subject has such a right of his own motion to imprison another English subject, whether his wife or any one else — of course, I am speaking of persons of full age and *sui juris*; but, assuming that there were such authority, it would be subject to the qualification I have mentioned in the case of apprehended ill-usage, and I am of opinion that the facts of this case afford ample ground for refusing to allow the husband to retain the custody of his wife. It seems to have been thought that the question how far a lady may be dealt with in this way depends on the exact amount of force or violence used or pain inflicted. But is it nothing that a lady coming out of church on a Sunday afternoon is to be seized by a number of men and forcibly put into a carriage and carried off? Must not the element of insult involved in such a transaction be considered? Then, if the lady's statement to the medical man be true, the moment she got into the house the husband took off her bonnet and threw it into the fire. The affidavit of the medical man states that the wife told him so: that affidavit is one of the husband's affidavits, and

there is no denial that this happened by the husband. I confess to regarding with something like indignation the statement of the facts of this case, and the absence of a due sense of the delicacy and respect due to a wife whom the husband has sworn to cherish and protect. With regard to the statements as to the earlier part of the history of the case, contained in the husband's affidavits, I am unwilling to look at them for this reason: I do not deny that unqualified and uncontradicted they do make out a case in his favour, so far as shewing that this alliance was entered into under circumstances which do not reflect any discredit on him. But I am unwilling to discuss those statements of the affidavits, because I do not know how far they can be trusted, inasmuch as the wife has not been permitted to have any opportunity of communicating with any legal adviser as to any matters on which she might have contradicted those affidavits. Therefore, it seems to me that, though one has no right to say that one disbelieves those statements, it is impossible to rely upon them under the circumstances. The result is, in my opinion, that there is no power by law such as the husband claims to exercise, and, if there were, the facts give ample ground to the lady to apprehend violence in the future. Either of these grounds is sufficient to shew that the return to this writ is bad, and that this lady must be restored to her liberty.

LORD ESHER, M. R. In this case it is really admitted that this lady is confined by the husband physically so as to take away her liberty. The only question for us to determine is whether in this case we can allow that to continue. The husband declares his intention to continue it. He justifies such detention; and the proposition laid down on his behalf is that a husband has a right to take the person of his wife by force and keep her in confinement, in order to prevent her from absent-ing herself from him so as to deprive him of her society. A series of propositions have been quoted which, if true, make an English wife the slave, the abject slave, of her husband. One proposition that has been referred to is that a husband has a right to beat his wife. I do not believe this ever was the law. Then it was said that, if the wife was extravagant, the husband might confine her, though he could not imprison her. The confinement there spoken of was clearly the deprivation of her liberty to go where she pleases. The counsel for the husband was obliged to admit that, if she was kept to one room, that would be imprisonment; but he argued that, if she was only kept in the house, that was confinement only. That is a refinement too great for my intellect. I should say that confining a person to one house was imprisonment, just as much as confining such person to one room. I do not believe that this contention is the law or ever was. It was said that by the law of England the husband has the custody of his wife. What must be meant by "custody" in that proposition so used to us? It must mean the same sort of custody as a gaoler has of a prisoner. I protest that there is no such law in England. *Cochrane's Case*, 8 Dowl. 630, was cited as deciding that the husband has a right to the custody,

such custody, of his wife. I have read it carefully, and I think that it does so decide. The judgment, if I may respectfully say so, is not very exactly worded, and uses different expressions in many places where it means the same thing; but that seems to me to be the result of it. It appears to me, if I am right in attributing to it the meaning I have mentioned, that the decision in that case was wrong as to the law enunciated in it, and that it ought to be overruled. Sitting here, in the Court of Appeal, we are entitled to overrule it. I do not believe that an English husband has by law any such rights over his wife's person, as have been suggested. I do not say that there may not be occasions on which he would have a right of restraint, though not of imprisonment. For instance, if a wife were about immediately to do something which would be to the dishonour of her husband, as if the husband saw his wife in the act of going to meet a paramour, I think that he might seize her and pull her back. That is not the right that is contended for in this case. The right really now contended for is that he may imprison his wife by way of punishment, or if he thinks that she is going to absent herself from him, for any purpose, however innocent of moral offence, he may imprison her, and it must go the full length that he may perpetually imprison her. I do not think that this is the law of England. But, assuming that there is such a right, the question arises whether the way in which and the circumstances under which it has been exercised in this case are such that the law ought to give back to the husband the custody of this lady against her will. The seizure was made on a Sunday afternoon when she was coming out of church, in the face of the whole congregation. He takes with him to assist him in making the seizure a young lawyer's clerk and another man. The wife is taken by the shoulders and dragged into a carriage, and falls on the floor of the carriage with her legs hanging out of the door. These have to be lifted in by, I believe, the clerk. Her arm is bruised in the struggle. She is then driven off to the husband's house, the lawyer's clerk riding in the carriage with them. Could anything be more insulting? The lawyer's clerk remains at the house, and a nurse is engaged to attend to the wife, who is not ill. Obviously the lawyer's clerk and the nurse are to help to keep watch over her and control her. That in itself is insulting. She goes to a window in the house, and, one of her relations being outside, the blind is immediately pulled down. I think that the circumstances of this seizure and detention were those of extreme insult, and I cannot think that it can be that under such circumstances as these the husband has a right to keep his wife insultingly imprisoned till she undertakes to consort with him. In my opinion, the circumstances are such that the court ought not to give her back into his custody. He has obtained, it is true, a decree for restitution of conjugal rights; but that gives him no power to take the law into his own hands and himself enforce the decree of the court by imprisonment. Formerly that decree might have been enforced by attachment for contempt; but that would have been an imprisonment by the court, not by the husband. The

power of attachment in such cases is now taken away. The suggestion, therefore, must be that, though the court has no power to force the wife to restore conjugal rights by imprisonment, the husband himself has a right to take her by force and imprison her without the assistance of the court. I think that the passing of the Act of Parliament which took away the power of attachment in such cases is the strongest possible evidence to shew that the Legislature had no idea that a power would remain in the husband to imprison the wife for himself; and this tends to shew that it is not and never was the law of England that the husband has such a right of seizing and imprisoning the wife as contended for in this case. If there is now a greater difficulty than there was in enforcing, or if it is now impossible effectively to enforce a decree for the restitution of conjugal rights, the Legislature has caused this by Act of Parliament, and the Legislature must deal with the matter. For these reasons I agree that the return to the writ is bad, and that the husband has so acted that we ought not to give back the custody of this lady to him.

Fry, L. J. [After discussing the authorities prior to 1884.] Therefore, if the matter rested there, I should say it was clear that by law there was no such right in the husband as contended for; but assume that the matter were doubtful at the time of the passing of the Act of 1884 with regard to the practice of the Matrimonial Causes Court, I say that it is doubtful no longer. That Act deprived the court of the power to enforce a decree for the restitution of conjugal rights by attachment, and substituted for that power two things: it gave power in the case of both husband and wife to order certain pecuniary allowances, and it further provided that non-compliance with the decree for restitution of conjugal rights should be deemed to amount to desertion without reasonable cause. These provisions are substituted for the old power to enforce the decree by attachment. I cannot think that, after the Legislature has taken away the right of the court to enforce restitution of conjugal rights by attachment, the husband has any right of imprisonment in a case in which he is at once a party, the judge, and the executioner, or that he can enforce such restitution by himself imprisoning the wife without the assistance of the court.

[Remainder of opinion omitted.]

Return held bad, and wife to go free.

CHAPTER II.

WIFE'S SEPARATE ESTATE IN EQUITY.

SECTION I.

Creation of a Separate Estate.

BENNET v. DAVIS.

1725. 2 *Peere Williams*, 316.

J. S. having married his daughter to one Bennet a tradesman in London, who was extravagant and in debt, the father makes his will, and devises the premisses in question (being lands in fee) to his daughter (the wife of Bennet) for her separate and peculiar use, exclusive of her husband, to hold the same to her and her heirs, and that her husband should not be tenant by the curtesy, nor have these lands for his life, in case he survived, but that they should upon the wife's death go to her heirs.

Soon after this the testator dies, and Bennet the husband becoming a bankrupt, the commissioners assign the lands in question (being the lands thus devised) to the defendant Davis in trust for the creditors; and upon Davis's bringing his ejectment, the bankrupt's wife by her next friend prefers her bill against Davis the assignee and her husband, in order to compel them to assign over this estate to her separate use.

It was objected on behalf of the defendant the assignee, that he being a creditor, and having the law on his side, it would be hard to take the benefit of the law from him; and that tho' the testator might intend these lands for the separate use of the daughter, yet that such his intention was not executed according to law; forasmuch as by law the husband during the coverture was intitled to the wife's estate in her right; and tho' the testator might have devised the premisses to trustees for the separate use of the wife, yet the question now was, not upon what he *might* have done, but upon what in fact he *had* done; and I mentioned the case of *Harvey and Harvey*, vol. i. 125, where a man had devised goods of value to his daughter a feme covert for her separate use, and it not being to trustees, Lord Cowper apprehended it to be a case of difficulty, but declared his present thoughts were that the intention of the testator was against the rule of law, and void; and I urged,

that the case of a devise of a legacy, or of a term to the wife for her separate use might be good, because these remained in the executor until assent, and equity would not compel the executor to assent, whereby the intention of the testator should be disappointed, but would continue the executor a trustee for the feme covert; whereas in the present case, the devise being of lands in fee to the wife herself, who by virtue of the will only, had an immediate title thereto, the husband must consequently be intitled to the profits in her right, and it would be repugnant to the law to say, that he should not take the profits.

That here was no trust, the testator never having intended to trust the husband, and the wife could not be a trustee for herself; besides the husband could not properly be a trustee for the wife, they both being but one person.

That all this strained construction was to do that which was against common right, (*viz.*) to create a separate property in a feme covert; and I put this case:

Suppose I should have rent-charge in fee, and my son had the land subject to the rent-charge, which should amount to near the value of the land, after which I should devise the rent-charge to my son (who had the land) and say by my will, that the rent should not be subject to the debts of my son, in this case the rent would be subject to his debts, in regard it would be merged, and yet this rent might have been given to trustees.

On the other hand the plaintiff's counsel would have read parol evidence to prove, that the testator did not intend these lands should be liable to the husband's debts.

But the court would not permit such evidence to be read, it being in the case of a devise of land, which by the statute must be all of it in writing.

As to the chief point, the Master of the Rolls [Sir JOSEPH JEKYLL] took it to be a clear case, that it was a trust in the husband, and that there was no difference, where the trust was created by the act of the party and where by the act of law.

If I should devise that my lands should be charged with debts or legacies, my heir taking such lands by descent would be but a trustee, and no remedy for these debts or legacies but in equity; so in the principal case, there being an apparent intention and express declaration, that the wife should enjoy these lands to her separate use, by that means the husband, who would otherwise be intitled to take the profits in his own right during the coverture, is now debarred, and made a trustee for his wife.

And admitting the husband to be a trustee, then the argument of the creditors having the law of their side was immaterial; as if the bankrupt had been a trustee for J. S. his bankruptcy should not in equity affect the trust-estate; and that in this case, tho' the husband the bankrupt might be tenant by the curtesy, yet he should be but a trustee for the heirs of the wife.

Also when the testator had a power to devise the premisses to trustees for the separate use of the wife, this court in compliance with his declared intention, will supply the want of them, and make the husband trustee; and the defendant the assignee, who claiming under the husband can have no better right than the husband, must join in a conveyance to a trustee, for the separate use of the wife.

Which was decreed accordingly.

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SECTION II.

Wife's Right to take Income of Separate Estate.

PICQUET v. SWAN.

1827. 4 Mason (U. S. Circuit Court), 443.¹

STORY, J. This suit is brought by the plaintiff, an alien and subject of the king of France, against James Swan, a citizen of this state, as principal debtor, and against certain persons who are summoned, as his trustees, viz. Harrison G. Otis, William Sullivan, and Hepzibah C. Howard, to recover the amount of certain bills of exchange belonging to the intestate, and yet due and unpaid by Swan. The process is familiarly known among us by the appellation of the trustee process, and is more generally known elsewhere by the appellation of foreign attachment. It has its origin in the statute of 1794, ch. 65, which provides, that any creditor, entitled to an action against his debtor, "having any goods, effects, or credits, so entrusted, or deposited in the hands of others, that the same cannot be attached by the ordinary process of law, may cause not only the goods and estate" of the debtor "to be attached in his own hands or possession, &c., but also of his goods, effects, and credits so entrusted and deposited," &c. by an original writ, by which the debtor and the supposed trustee are summoned to appear, and answer to the suit in the manner prescribed by the act. In the present case the principal has not yet appeared; but the persons sued as trustees have appeared pursuant to the statute, and have made regular disclosures of facts under oath; and they now demand that they be discharged from the suit, upon the ground, that these disclosures established that they have no goods, effects, or credits of the debtor entrusted or deposited with them in the sense of the statute.

The first question presented by the disclosures arises from the post-nuptial settlements stated in the case. The first is by an indenture tripartite of the 14th of June, 1796, between John Coffin Jones, of the one part, James Swan and Hepzibah his wife of the second part, and Henry Jackson and Joseph Russell of the third part, reciting that Jones had on that day transferred to Jackson and Russell 86,000 dollars, of the five and a half per cent. stock of the United States, in trust for the said Hepzibah, with the consent of her husband. The trusts expressly authorize her to receive the whole, principal and interest, to her separate use during her coverture, and to dispose of

¹ Statement omitted. Only so much of the opinion is given as relates to a single point. — ED.

the same as she may please, during her life-time, and afterwards to appropriate the same to such persons as she should by deed, or by any writing purporting to be a last will and testament, limit, direct, and appoint. It does not appear, from any recital in this indenture or otherwise, from whom the property so placed in trust was derived.

[Omitting facts as to subsequent indentures conveying property in trust for Mrs. Swan.]

Mrs. Swan, in pursuance of these several indentures, made a certain instrument, purporting to be her last will and testament, dated the 29th of April, 1825, and thereby executed, in the fullest manner, her powers of appointment over the real and personal property, which passed under all the indentures above-mentioned. By this testamentary instrument she bequeathed the whole of her real and personal estate to William Sullivan, Harrison Gray Otis, and William Foster Otis, whom she also made her executors, in trust, to pay certain legacies and annuities, and to distribute the residue among her three daughters, with the usual powers of sale, &c.

Mrs. Swan died in August, 1825.

[The court *held*, that the post-nuptial settlements were valid.]

In the next place, it is argued, that, however valid may have been the original settlements, or subsequent trusts, still the moment the proceeds, or income, arising from the property so secured, were paid by the trustees into the hands of Mrs. Swan, they ceased to be trust funds, and were immediately liable to attachment, as her husband's property, in the same manner, as if they had been her property, not secured by trusts. This proposition is utterly untenable in a court of equity. It involves, in effect, a total defeat of the original trusts. These trusts were to secure the income and proceeds to the sole and separate use of Mrs. Swan, with an unlimited power to dispose of them as a *feme sole*. Nothing is more clear, than that the separate property of a *feme covert*, secured or given to her separate use, will be upheld for her use by a court of equity. Into whose ever hands the same may come, whether of a stranger, or even of the husband, if it comes clothed with the trust, and with notice of it, the party, so possessing it, becomes a trustee for the *feme covert*. It is in no sense the property of the husband, and can never become his, except by a voluntary appropriation of it to his use by the wife herself. She may invest it as she pleases; and appropriate it to furniture, or pictures, or plate, or jewelry, or bank stock, or other securities, or personal ornaments, or paraphernalia, still it is her own, and cannot be touched while she retains her power and dominion over it. For these principles I do not cite particular authorities. They are spread everywhere over the doctrines on this subject, which have been long entertained by courts of equity, and are now generally considered as incontrovertible. Indeed, the moment courts of equity decided, that *femes covert* could hold separate property to their own use, as *femes sole*, it was a necessary consequence, that the protection of it should be as universal as the right.

The principle is not even confined to cases, where trustees are appointed to preserve the trust ; but it extends to cases, where no trustees are interposed, and yet the nature of the property, or the express provisions of the donation, direct it to be for the separate use of the wife. Even the husband himself will, in such cases, be adjudged a trustee for the benefit of his wife.

In the next place, it is argued, that the personal property in the possession of Mrs. Swan, at the time of her decease, is to be deemed her husband's ; and especially the furniture, books, silver plate, and pictures, which are stated in the answers. Now that depends altogether upon the question, whether these were her own separate property at that time, either by original purchase from her own separate property, or as proceeds of her original property, or by any other equitable title as against her husband. For if they were, they are not liable to attachment as her husband's property, but must pass according to her own appointment and disposition of them.

[Remainder of opinion omitted.]

Trustees discharged.

SECTION III.

*Wife's Capacity to Convey, or Devise, Separate Estate.
Restraint on Anticipation.*

TAYLOR v. MEADS.

1865. 4 *De Gex, Jones, & Smith*, 597.¹

THIS was an appeal by the plaintiff from the dismissal of his bill with costs by the MASTER OF THE ROLLS under the circumstances hereinafter stated.

Under the will of William Meads, made in 1841, and in the events which had happened at the date when Elizabeth Meads, the wife of Percy Meads, made her will as hereinafter mentioned, some freehold cottages were vested in trustees upon trust only for her (she being described in the will as the wife of Percy Meads), her heirs and assigns, and to be assigned, released, conveyed, or otherwise well and effectually assured by her to any person or persons whomsoever, his, her or their heirs or assigns, in such manner as she should at any time or times, and notwithstanding her coverture, direct or appoint, by any instrument in writing to be by her signed, sealed and delivered in the presence of and attested by two or more credible witnesses, and in default of such direction or appointment, and so far as the same should not extend, in trust only for her, her heirs and assigns for ever, with a declaration of the testator's express will and meaning to be that she should, notwithstanding her coverture, stand possessed of the property for her sole and separate use and benefit, and that the same should not in any manner be subject or liable to the debts, control, engagements or interference of Percy Meads.

Elizabeth Meads never formally exercised her special power of appointment over the property, but by her will made in May, 1845, she gave and devised all her real and personal estate over which she had a disposing power to her husband Percy Meads, his heirs, executors, administrators and assigns for ever absolutely.

Her will was executed with all the formalities required by the New Wills Act, 1 Vict. c. 26, but was not under the seal of the testatrix.

The testatrix died in November, 1845, and the legal estate in fee of the property was got in by her surviving husband, Percy Meads.

He died in July, 1860; and in 1862 the appellant, who was the heir at law of Elizabeth Meads, instituted this suit against the respondents, who were respectively tenant for life and tenant in fee in remainder of the property in question under Percy Meads' will as defendants, seeking a declaration that Elizabeth Meads' will did not operate as a valid execution of the power of appointment vested in her under William Meads'

¹ Arguments and part of opinion omitted. — Ed.

will, and that the appellant was entitled to the property as her heir at law, and for consequential relief.

The MASTER OF THE ROLLS held that the will of Elizabeth Meads operated as a valid execution of the power of appointment vested in her under William Meads' will: and so holding dismissed the appellant's bill, as has been stated, with costs: at the same time abstaining from giving any opinion upon a second question which had been argued before his Honor, namely, whether the testatrix had not, under William Meads' will, a power of disposition over the property by will in default of her exercise of the special power of appointment by virtue of her separate estate in the property, and as an incident to that separate estate.

Upon the present appeal these two questions were both again argued. *Hobhouse* and *Fischer*, for appellant.

J. W. Chitty, for respondents.

The LORD CHANCELLOR [LORD WESTBURY].

[His Lordship *held*, that the will, which was not under seal, was not a good execution of the power that required an instrument in writing under seal. He then said:]

I must direct, therefore, that the judgment of the MASTER OF THE ROLLS be reversed.

This gives rise to the next question, upon which there has been no decision in the court below, namely, whether in a case where real estates are conveyed or devised to trustees in fee upon trust for the sole and separate use of a married woman and her heirs, she has the same power of disposition by deed or will over the equitable fee as she would have if she were a *feme sole*. Can she convey the equitable fee without the necessity of the instrument being acknowledged in the manner required by the statute for the abolition of fines and recoveries; and can she, during coverture, devise the equitable estate by a will executed in conformity with the statute?

There is no difficulty as to the principle.

When the courts of equity established the doctrine of the separate use of a married woman and applied it to both real and personal estate, it became necessary to give the married woman, with respect to such separate property, an independent personal status, and to make her in equity a *feme sole*. It is of the essence of the separate use that the married woman shall be independent of and free from the control and interference of her husband. With respect to separate property, the *feme coverte* is by the form of trust released and freed from the fetters and disability of coverture, and invested with the rights and powers of a person who is *sui juris*.

To every estate and interest held by a person who is *sui juris* the common law attaches a right of alienation, and accordingly the right of a *feme coverte* to dispose of her separate estate was recognised and admitted from the beginning, until Lord Thurlow devised the clause against anticipation.

But it would be contrary to the whole principle of the doctrine of sep-

arate use to require the consent or concurrence of the husband in the act or instrument by which the wife's separate estate is dealt with or disposed of. That would be to make her subject to his control and interference. The whole lies between the married woman and her trustees; and the true theory of her alienation is, that any instrument, be it deed or writing, when signed by her, operates as a direction to the trustees to convey or hold the estate according to the new trust which is created by such direction. This is sufficient to convey the *feme covert's* equitable interest; and when the trust thus created is clothed by the trustees with the legal estate the alienation is complete, both at law and in equity.

With regard to ordinary equitable estates belonging to a *feme covert*, for example, where lands are given to trustees in fee upon trust for a married woman and her heirs, or for a single woman in fee (who afterwards marries), equity follows the law, and, preserving the analogy between legal and equitable estates, requires that the equitable estate of the married woman shall be conveyed *inter vivos* in the same manner as a legal estate: and in like manner an estate of this nature cannot be devised by a *feme covert*, for the incapacity to make a will of lands by the 14th section of the 34 & 35 of Hen. 8, c. 5, is in this respect not removed by the Act of 1 Vict. c. 26; but the interest created by the separate use is the creature of a court of equity, to which there is nothing correspondent at law, and which would be deprived of its character if it were made subject to a form of alienation that proceeds upon the basis of the existence of control and interest in the husband and personal disability in the wife.

The violence thus done by courts of equity to the principles and policy of the common law as to the status of the wife during coverture is very remarkable, but the doctrine is established and must be consistently followed to its legitimate consequences.

It is right to advert in few words to the statute law and to the decided cases.

By the 14th section of the Statute of Wills, 34 & 35 Hen. 8, c. 5, it was enacted, that wills or testaments made of any manors, lands, tenements or other hereditaments by any woman *covert* should not be taken to be good or effectual in the law. This enactment, no doubt, referred to lands vested in a *feme covert* in fee simple, and of which her husband was seised *jure uxoris*. Courts of equity appear to have considered it as not applicable to separate estate, which was unknown at the time of the passing of the statute.

Between that time and the Act of the 1 Vict. c. 26, the doctrine of the separate use was fully established, and the *feme covert*, when not restrained from alienation, was considered in equity as entitled to the same rights of alienation over her separate property as are possessed by persons *sui juris*.

Then followed the present Wills Act, 1 Vict. c. 26, by the 8th section of which it is enacted, that no will made by any married woman shall be

valid except such a will as might have been made by a married woman before the passing of the Act.

This brings us to the decided cases, in which there is some inconsistency, but they preponderate greatly in favour of the proposition that a *feme covert*, when not restrained from alienation, has in equity the same *jus disponendi* over her separate estate by deed or will as she would if free from the disability of coverture.

In addition to *Peacock v. Monk*, 2 Ves. 190, and the well known decisions of Lord Thurlow, it is sufficient to refer to *Tullett v. Armstrong*, 1 Beav. 1; *Baggett v. Meux*, 1 Ph. 627; the judgment of the Lord Justice Turner in *Atchison v. LeMann*, 23 L. T. 302; and, finally, to the recent case of *Adams v. Gamble*, 11 Ir. Ch. 269; 12 Ir. Ch. 102, in the Court of Appeal in Ireland, where the point was expressly determined from the earlier decisions. Lord St. Leonards, in his book on "Powers," 173, 8th ed., derived the same conclusion, which he states in these words: "Where a married woman has property settled to her separate use without any restraint on alienation, she is deemed a *feme sole*, and may dispose of it accordingly."

I must hold, therefore, that a *feme covert*, where not restrained from alienation, has, as incident to her separate estate and without any express power, a complete right of alienation by instrument *inter vivos* or will.

It was contended at the bar that the effect of this devise was to give the married woman an estate to her separate use only during the joint lives of herself and her husband, with remainder to herself in fee. But that is not the true construction of the will—the estate given to Elizabeth Meads is one and entire, being the equitable estate in fee, with a declaration, the effect of which is, that her husband shall have no interest in the estate so devised, nor shall the wife be under any disability with respect to such estate by reason of her existing coverture, but shall have the same rights of enjoyment and disposition as if she were a single and not a married woman.

It was also contended that inasmuch as a special power of appointment was in terms given, no further power of disposition ought to be implied; but it is well settled that a special power of appointment does not derogate from the right of disposition which is incidental to ownership; and here the will of Mrs. Elizabeth Meads is a valid disposition, not as an exercise or by virtue of any power of appointment, but by virtue of that right of alienation which, when not prohibited, is incidental to the separate estate in fee.

I cannot, therefore, concur with the judgment of the MASTER OF THE ROLLS, or with the order which he has made, and which must be reversed, and in lieu thereof declare that the will of Elizabeth Meads was not a good execution of the power given to her to appoint by an instrument in writing to be by her signed, sealed and delivered, but was a valid devise of the estate given to her and her heirs, and which it was declared by the will of the testator she should hold for her separate use, and dismiss the bill without costs.

JACKSON v. HOBHOUSE ET ALS.

1817. 2 *Merivale*, 483.¹

THE defendant Mary Cox, being entitled to the sum of £6,000 under the will of Samuel Neate (her late husband), of which will the defendants Hobhouse, Moggridge, and Perkins were executors, by a settlement made subsequent to her marriage with the defendant George Cox, this sum was assigned to the executors, upon trust to permit the wife to receive the interest during her life to her separate use, and after her death, in case her husband should survive her, upon trust to pay the same to him during his life, and after the decease of the survivor in trust for the children of the marriage, and in case there should be no children, then for the survivor, his or her executors, &c. The settlement contained a proviso against the wife assigning or otherwise disposing of the interest of the said sum in any mode of anticipation.

Subsequently Cox and his wife, desiring to raise money by selling to the defendant Leeke an annuity to be secured on the £6,000, entered into an indenture with Leeke, and the plaintiff, Jackson; whereby Cox and the plaintiff, as his surety, covenanted with Leeke for the payment of the annuity; Mary Cox, the wife, appointing that the trustees in the settlement should pay and apply the yearly interest of the £6,000 during her life to Leeke, upon the trusts thereafter mentioned. And Cox and his wife thereby bargained and sold to Leeke the said yearly interest during their respective lives, and the principal sum to which the survivor would be entitled in the event of there being no issue of the marriage; upon trust, in the first place, to pay himself (Leeke) the said annuity, and subject thereto upon the trusts of the settlement.

Default having been made in the payment of the annuity, Leeke recovered judgment against Jackson upon the covenant. Whereupon Jackson brought the present bill, praying (*inter alia*) for an injunction to restrain the executors (trustees under the settlement) from disposing of the said principal sum, or the interest thereof, and from making any payment on account thereof to the defendants, Cox and his wife, or to any person for their use.

An injunction having been obtained, a motion was now made, on behalf of Mrs. Cox, to dissolve the injunction.

Leach, in support of the motion.

Sir *S. Romilly* and *Blake*, for plaintiff.

Sugden, for the defendant Leeke.

The LORD CHANCELLOR [LORD ELDON].

For many years after I entered into the profession, no such thing was known as a clause of restraint upon alienation of a wife's separate property by way of anticipation. The terms of the power in *Hulme v. Tenant*,

¹ Statement abridged. Only so much of the report is given as relates to a single point. Arguments omitted. — ED.

1 Bro. 16, will be remembered; and there Lord Thurlow held that, the bond being executed, the creditor was entitled to the benefit of its execution. Yet it is obvious that such a determination must defeat the intention with which the power was given. It was afterwards attempted, in cases like *Pybus v. Smith*, 3 Bro. 340; 1 Ves. Jr. 189, to be established that the alienation must be *eo modo* with the power given; that the circumstance of a direction to pay the interest from time to time into the proper hands of a married woman was enough to prevent her from having any absolute disposing power over the property, or any part, before the time of her own proper receipt of it. But this attempt also was overruled. Lord Thurlow still continued to struggle hard that the wife might be brought into a situation consistent with the manifest intention of the settlor; but he thought the decisions too strong against it. At last, he began to alter his opinion: first, in the case of *Miss Watson* (see *Parkes v. White*, 11 Ves. 221, &c.), where he reasoned thus:—a *feme covert*, having power to alien, is a mere creature of equity to the extent to which the settlement constitutes her a *feme sole*, and no farther; and he therefore thought that the court might modify the power of alienation by such a clause as that now under consideration. Lord Alvanley, who followed, thought it a valid clause, and so it has been considered ever since. It is too late now to contend against the validity of a clause in restraint of anticipation.

[Remainder of opinion omitted.]

Injunction dissolved.

SECTION IV.

Descent, or Distribution, of Separate Estate.

PROUDLEY v. FIELDER.

1833. 2 *Mylne & Keen*, 57.¹

IN contemplation of a marriage between Mr. Leader and Mrs. Dawson, articles of agreement were entered into between them, and signed by both parties. In those articles it is stipulated (*inter alia*), that certain monies in the government funds, then possessed by Mrs. Dawson, "shall be for the sole and separate use of the said Mrs. Dawson, to all intents and purposes, as if she were sole and unmarried; and that the said monies shall be conveyed or transferred to trustees, and a proper settlement executed, so as fully to carry into effect the intention of the parties; and in case of the said marriage taking effect, and the said Lydia Dawson surviving the said Philip Holman Leader, she the said Lydia Dawson shall hold and enjoy the rents and profits of the freehold estate of the said Philip Holman Leader for her life."

The marriage took effect, but no settlement was ever executed. The wife died in the husband's lifetime without issue, and without having made any appointment of her separate property; and the husband took out administration to her estate. The husband having subsequently died, the bill was filed by the next of kin of the wife against the executors of the husband's will, and against certain of his legatees; and it prayed a declaration that, upon the true construction of the articles, the plaintiffs were entitled to the wife's property in the funds, as if she had not been married.

Mr. *Pemberton* and Mr. *Dixon*, for the plaintiffs.

Mr. *Bickersteth*, Mr. *Kenyon Parker*, and Mr. *H. J. Perry*, for the defendants.

The MASTER OF THE ROLLS. [Sir JOHN LEACH.]

These monies were to be for the sole and separate use of Mrs. Leader, as if she were sole and unmarried. This expression has no reference to the devolution of the property after her death. She is to retain the same absolute enjoyment of the monies, and is to have the same power of disposition over them, as if she were sole and unmarried; but there is not one word here to vest the property after her death in her next of kin, or to defeat the right which her surviving husband is entitled to acquire as her administrator.²

¹ Statement abridged. — Ed.

² "As to the devolution of the separate estate, where the wife has neither alienated it in her lifetime nor disposed of it by testamentary instrument.

"In the consideration of this question, you must of course bear in mind, that in by far the larger number of cases the control of a wife over her own property is preserved

by means of a power of appointment by will, with a gift in default of appointment amongst her next of kin excluding her husband. Where this is so, if the wife makes no will, still the husband gets nothing, because the parties entitled as in default of appointment take.

"But the case to which I have now to direct your attention is that of property which is settled, or agreed to be settled, simply *for the separate use* of a married woman, who dies without exercising her privilege of alienation. In this case, upon the death of the married woman the property will devolve in the same manner as it would have done had it never been secured to her separate use. By her death, the coverture determines, the separate use drops off, and the property, regaining its simple original quality, goes to the wife's heir, if it be real estate" [subject to the husband's right as tenant by the curtesy], "and to her husband, either in his marital right, or as an administrator, if it be personal estate." Haynes' Outlines of Equity, 4th ed. pp. 241, 242. — Ed.

SECTION V.

*Enforceability and Effect of Contracts made by Wife having
Separate Estate.*

EX PARTE JONES. IN RE GRISSELL.

1879. *Law Reports, 12 Chancery Division, 484.*¹

THIS was an appeal from a decision of Mr. Registrar BROUGHAM, acting as Chief Judge in bankruptcy.

Mrs. Grissell, the wife of Mr. C. E. Grissell, was, under the provisions of a settlement made upon her marriage (after 1870), entitled to the income of certain trust moneys, for her separate use without power of anticipation.

In January, 1879, C. E. Grissell entered into a contract with F. Jones for the purchase of a leasehold house for £10,500. On the 8th of January Mrs. Grissell drew a cheque on her bankers for £500, and handed it to Jones for the purpose of paying a deposit in respect of the £10,500. Before, however, the cheque had been presented to the bankers for payment she instructed them to refuse payment, and when it was presented by Jones payment was accordingly refused. Jones then issued a debtor's summons against Mrs. Grissell for £500, which he alleged to be due to him in respect of the cheque. Mrs. Grissell applied to the court to dismiss the summons. She filed an affidavit in which she denied that she was indebted to Jones in the amount claimed in the summons, or in any amount whatever, and she said that before and at the time when the cheque was given she was a married woman. The Registrar dismissed the summons. Jones appealed.

Winslow, Q. C., and *Crispe*, for appellant.

De Gex, Q. C., and *W. Phipson Beale*, for Mrs. Grissell, were not heard.

JAMES, L. J. I think that the appeal cannot be sustained. Before the modern legislation it is admitted that the law had been clearly established, and that it was correctly laid down by Mr. Cooke, who was a very great authority on the subject, in his treatise on the Bankrupt Laws, 8th ed., Vol. I., p. 47, as follows: "But the later determinations appear to have overruled the effect of these cases, and it seems now to be decided that, although the husband and wife live separate by deed, and the wife has a separate maintenance" (and separate maintenance and separate estate are really the same thing), "yet that she cannot become legally responsible for contracts which she may enter into, as if she were sole and unmarried; and that, therefore, she cannot be sued as a *feme sole*, whilst the relationship of marriage subsists between them, and whilst she

¹ Arguments omitted, also part of the opinion of BRETT, L. J. — ED.

and her husband are living in the kingdom. And, if this is the case, it follows that no commission could be supported against her under such circumstances." That was the state of the law at that time. When was it altered? Can a married woman be sued as a *feme sole* because she has separate property? The Married Women's Property Act of 1870 contains no provision for suing a married woman except in respect of debts contracted by her before her marriage. If she is not liable to be sued as a *feme sole* in what used formerly to be called a common law action, she is not liable to be sued for a debt at all. In equity the liability was to have her separate estate taken from her for the benefit of a person with whom she had contracted on the faith of it. That was a special equitable remedy arising out of a special equitable right. But the married woman who contracts in that way is not a debtor in any sense of the word, and, she not being a debtor, the whole foundation of the appellant's case fails. A debtor's summons is a summons against a debtor. The respondent is not a debtor, and therefore there was no legal authority to issue a debtor's summons against her, and no proceedings in bankruptcy founded upon it could be effectually taken.

BRETT, L. J.

The Married Women's Property Act has nothing to do with the case; it is not within its provisions. The difficulty in the way of the appellant is this, that, although it is no longer necessary that a bankrupt should be a trader, the other condition remains precisely the same as before. A bankrupt must still be a debtor, *i. e.*, a person who can be sued as upon and for a debt. The procedure of courts of equity for making the separate estate of a married woman available to satisfy her engagements existed under the old Bankruptcy Acts, just as it does under the present Act. But it did not enable any one to sue a married woman as upon and for a debt in a court of equity, and certainly not in a court of common law. It was a peculiar remedy against the separate property of the married woman so long as it existed, but it was not a remedy against her as upon and for a debt. It was a peculiar remedy in the Court of Chancery. A married woman was not and is not now liable to be sued as a debtor, and therefore now, as formerly, she is not liable to be made a bankrupt.

COTTON, L. J. The question is, whether or no a married woman having separate estate is liable to be made a bankrupt. In my opinion the Judicature Acts and Rules have no effect on the question; they give no new rights as against married women, though they have made some difference in the mode in which they may be sued. Nor has the Married Women's Property Act any application. The question is simply whether a married woman having separate estate can be made a bankrupt. If she can, it would be an anomalous kind of bankruptcy. What property would vest in the trustee under the bankruptcy? Certainly not all her property. Her real estate not settled to her separate use would not. Only the separate estate, against which her creditors

would have had an equitable remedy, could be considered as vested in the trustee. The question is, whether it can be said that a married woman who has separate estate, on the faith of which she has made engagements, can be said to be a debtor within the meaning of the Bankruptcy Act. A debtor's summons is a proceeding only against a debtor, and it is instituted for the purpose of founding proceedings in bankruptcy against the debtor under the Bankruptcy Act. It is said that a married woman is a debtor, because she is liable to have proceedings taken against her to obtain satisfaction of such a debt as this out of her separate estate. But that involves a fallacy. A debtor must be a person who can be sued personally for a debt, and who is liable to all the consequences of a personal judgment against him. But that is not at all the position of a married woman, even though she has separate estate; proceedings cannot be taken against her personally to enforce payment of a debt. Formerly courts of equity compelled the satisfaction of her general engagements out of her separate property, and now that is done by all the Divisions of the High Court. But it is only a proceeding to compel the satisfaction out of the separate property of engagements made with reference to and upon the credit of it. As Lord Justice James said in *London Chartered Bank of Australia v. Lemprière*, Law Rep. 4 P. C. 597, "The married woman intended to contract so as to make herself, that is to say, her separate property, the debtor." It is not the woman, as a woman, who becomes a debtor, but her engagement has made that particular part of her property which is settled to her separate use a debtor, and liable to satisfy the engagement. She herself is not a debtor, within the meaning of the Bankruptcy Act. It is said, however, that a married woman who had traded separately from her husband under the custom of London, could be made a bankrupt. But why was that? Because by the trading she had become personally liable to be sued for debts contracted in the trading, and liable to all the consequences of a personal judgment. On that ground it was held that she was entitled to the protection of the bankrupt law. I cannot help thinking that what was said by Lord Cairns in *Ex parte Holland* goes far to decide the present case. He evidently considered that under the law as it existed before the Married Women's Property Act of 1870, a married woman was not liable to be made a bankrupt in respect of her separate property, and that, although the Act had made her liable to be sued, it could not, in the absence of clear words, be held to have made her liable to be made a bankrupt. Though it was not a direct decision on the point, it was an indication of the Lord Chancellor's opinion. In my opinion the Act of 1870 does not render a married woman who has separate estate liable to be made a bankrupt. I should add that I think that when sect. 12 of that Act says that a married woman shall be liable to be sued for debts contracted before marriage, it only means liable to be sued as in equity for the purpose of attaching her separate estate.

The appeal was dismissed with costs.

MURRAY v. BARLEE

1834. 3 *Myline & Keen*, 209.¹

By a settlement made on the marriage of Charles W. Barlee and Frances Sarah Mitchell, certain freehold estates and personal property were conveyed to trustees, in trust to apply rent-charges and dividends unto Frances Sarah Mitchell, or permit her to receive them for her sole use, exclusive of her then intended or any future husband, so that the same might not be under his control, or subject to his disposition, debts, or engagements; and so that the receipts of Frances Sarah Mitchell, or her appointee might, notwithstanding her coverture, be a good discharge for such part of the same as should therein be expressed to be received.

The settlement contained clauses restraining Frances Sarah Mitchell from anticipating, charging, or assigning the income accruing from certain portions of the property thus settled for her separate use.

In 1818 Mr. and Mrs. Barlee separated, and from that time continued to live apart.

In 1819 Mrs. Barlee, by her next friend, filed a bill against her husband and the trustees of the settlement, praying for an account of the rents and dividends of the property settled to her separate use. The bill was referred to a master to take an account, and subsequently a receiver of Mrs. Barlee's separate property was appointed.

The plaintiffs, Charles Murray and J. A. Murray, were retained by Mrs. Barlee, and acted as her solicitors in the cause of *Barlee v. Barlee*, from 1824 to 1828, when she discharged them from being her solicitors.

During the above-mentioned period the plaintiffs were also employed by Mrs. Barlee in various other matters besides the suit of *Barlee v. Barlee*. In August, 1824, they were employed by her in opposing a petition presented by her husband to the Lord Chancellor for the purpose of obtaining a commission of lunacy against her, which petition was eventually dismissed. In the same year they obtained a *habeas corpus*, by virtue of which Mrs. Barlee, who was at that time confined in Ipswich gaol under the process of an ecclesiastical court, was brought up and discharged. In 1825 they were employed by her in prosecuting certain persons for a conspiracy, and they afterwards defended a suit instituted against her for the purpose of charging her separate estate with certain debts alleged to have been incurred by her for necessaries while living apart from her husband. Mr. Barlee, the husband, had several years ago become bankrupt, was insolvent, and resided out of the jurisdiction of the court. During the time the plaintiffs acted as the solicitors of Mrs. Barlee, various letters were written to them by Mrs. Barlee, in which she instructed them to act as her solicitors; and

¹ Statement abridged. Arguments and part of opinion omitted. — Ed.

in some of such letters she adverted to her husband's bankruptcy or insolvency, and the fact of his having left England to avoid his creditors, and she promised or gave the plaintiffs to understand that she would pay the costs and charges to become due to them for business done by them for her; but she did not refer to her separate property, or expressly promise to pay such costs and charges out of it.

The bill, filed by the plaintiffs against Charles William Barlee, and Frances Sarah his wife, and the continuing trustee of their marriage settlement, stated the above-mentioned facts, and prayed a declaration that the amount due to the plaintiffs for their fees, charges, and disbursements ought to be paid to them out of the income of Mrs. Barlee's separate property; and that a sufficient part of the monies paid into the bank by the receiver in the cause of *Barlee v. Barlee*, and of the monies to be thereafter received on account of Mrs. Barlee's separate property, might be applied in payment of what was due to the plaintiffs, and that, in the meantime, Mrs. Barlee might be restrained from receiving any part of the proceeds of such separate property.

To that bill Mrs. Barlee put in a general demurrer, which was overruled by the Vice-Chancellor. The argument and judgment upon the demurrer are reported in the fourth volume of Mr. Simons's Reports p. 82.

The cause was afterwards heard before the Vice-Chancellor on the 17th of November, 1831, when his Honor decreed that the bill of costs should be taxed; that the plaintiffs should give credit for the monies which they had received from Mrs. Barlee, and that the balance should be paid to them out of those particulars of her separate property as to which she was not restrained from anticipation.

From this decision Mrs. Barlee presented a petition of appeal to the Lord Chancellor.

The *Solicitor-General* (Sir C. Pepys) and *Jacob*, in support of the decree.

Sir *Charles Wetherell* and *Girdlestone, Jr.*, for appellant.

THE LORD CHANCELLOR [Lord BROUGHAM]. It is said that this case raises, for the first time, the question whether or not a *feme covert* can bind her separate estate, and, in respect of it, be sued as a *feme sole* for law expenses incurred by her, that is, for her attorney's or solicitor's bill of costs, upon her retainer and promise to pay merely, and without any more formal instrument or obligation. For I do not understand it to be denied, and, if it were, all authority would be decisive in removing even a doubt upon this, that had a bond been given to the solicitor, the separate estate would have been liable, and the wife suable upon that instrument, just as much if the consideration were a bill of costs at law or in equity, as if the instrument had had its origin in any other consideration. But it is said that here the retainer and the promise thereby implied to pay the costs incurred, or the promise proved by the correspondence, are insufficient to charge the separate estate and render the wife liable to a suit.

That at law a *feme covert* cannot in any way be sued, even for necessities, is certain. Bind herself, or her husband, by specialty she cannot; and although, living with him, and not allowed necessities, or apart from him, whether on an insufficient allowance or an unpaid allowance, she may so far bind him that those who furnish her with articles of subsistence may sue him, yet even in respect of these she herself is free from all suit. This is her position of disability, or immunity at law; and this is now clearly settled. Her separate existence is not contemplated; it is merged by the coverture in that of her husband; and she is no more recognised than is the *cestui que trust* or the mortgagor, the legal estate, which is the only interest the law recognises, being in others. But though this is now settled law, we know that it was not always so; or at least that an exception was admitted to what all men allowed to be the general rule. [His Lordship then referred to the views expressed by Lord MANSFIELD in *Corbett v. Poelnitz*, 1 Term, 5, and subsequently overruled in *Marshall v. Rutton*, 8 Term, 545.] The doors of the courts of common law were thus shut against an admission of the equitable principle; and the law was fixed, that in those courts the wife could in no way be sued by reason of her having separate property, and living apart from her husband.

But in equity the case is wholly different. Her separate existence, both as regards her liabilities and her rights, is here abundantly acknowledged; not, indeed, that her person can be made liable, but her property may, and it may be reached through a suit instituted against herself and her trustees. It may be added, that the current of decision has generally run in favour of such recognition. The principle has been supposed to be carried further in *Hulme v. Tenant*, 1 Bro. C. C. 16, than it had ever been before, because there a bond in which the husband and wife joined, and which, indeed, so far as the obligation of the wife was concerned, was absolutely void at law, was allowed to charge the wife's estate vested in trustees to her separate use, though such estate could be only reached by implication; and though till then the better opinion seemed to be, that the wife could only bind her separate estate by a direct charge upon it. Lord Eldon repeatedly expressed his doubts as to this case; but it has been constantly acted upon by other judges, and never, in decision, departed from by himself. It is enough to mention *Heatley v. Thomas*, 15 Ves. 596, and *Bullpin v. Clarke*, 17 Ves. 365, both before Sir William Grant, who in the latter case held the wife's separate estate to be charged by a promissory note for money lent to her; which at law never could have charged the husband in any way, directly or indirectly. The same was held as to a bill of exchange accepted by a *feme covert* in *Stuart v. Lord Kirkwall*, 3 Mad. 387, and an agreement by the wife as to her separate estate in *Master v. Fuller*, 1 Ves. jun. 513, and 4 Bro. C. C. 19. In all these cases I take the foundation of the doctrine to be this; the wife has a separate estate subject to her own control, and exempt from

all other interference or authority. If she cannot affect it, no one can; and the very object of the settlement which vests it in her exclusively is to enable her to deal with it as if she were discovert. The power to affect it being unquestionable, the only doubt that can arise is, whether or not she has validly incumbered it. At first the court seems to have supposed that nothing could touch it but some real charge, as a mortgage, or an instrument amounting to an execution of a power, where that view was supported by the nature of the settlement. But afterwards her intention was more regarded, and the court only required to be satisfied that she intended to deal with her separate property. When she appeared to have done so, the court held her to have charged it, and made the trustees answer the demand thus created against it.

A good deal of the nicety that attends the doctrine of powers thus came to be imported into this consideration of the subject. If the wife did any act directly charging the separate estate, no doubt could exist; just as an instrument expressing to be in execution of a power was always, of course, considered as made in execution of it. But so, if, by any reference to the estate, it could be gathered that such was her intent, the same conclusion followed. Thus, if she only executed a bond, or made a note, or accepted a bill, because those acts would have been nugatory if done by a *feme covert* without any reference to her separate estate, it was held in the cases I have above cited, that she must be intended to have designed a charge on that estate, since in no other way could the instruments thus made by her have any validity or operation; in the same manner as an instrument, which can mean nothing if it means not to execute a power, has been held to be made in execution of that power, though no direct reference is made to the power. Such is the principle, and it goes the full length of the present case.

But doubts have been in one or two instances expressed as to the effect of any dealing whereby a general engagement only is raised, that is, where she becomes indebted without executing any written instrument at all. This point was discussed in *Greatley v. Noble*, 3 Mad. 79; and the present Master of the Rolls appears, in the subsequent case of *Stuart v. Lord Kirkwall*, 3 Mad. 387, to have been of opinion that the wife's separate estate was not liable without a charge, and to have supposed that he had before stated that opinion in *Greatley v. Noble*, though he by no means expressed himself so strongly in disapproving of that case, and distinctly abstained from deciding the point.

I own I can perceive no reason for drawing any such distinction. If, in respect of her separate estate, the wife is in equity taken as a *feme sole*, and can charge it by instruments absolutely void at law, can there be any reason for holding that her liability, or, more properly, her power of affecting the separate estate shall only be exercised by a written instrument? Are we entitled to invent a rule, to add a new chapter to the Statute of Frauds, and to require writing where that act requires none? Is there any equity, reaching written dealings with

the property, which extends not also to dealing in other ways, as by sale and delivery of goods? Shall necessary supplies for her maintenance not touch the estate, and yet money furnished to squander away at play be a charge on it, if fortified by a scrap of writing? No such distinction can be taken upon any conceivable principle. But one of the earlier cases, *Kenge v. Delavall*, 1 Vern. 326, makes no mention of such a distinction, for there being indebted generally is all that is stated as grounding the claim; and in *Lillia v. Airey*, 1 Ves. jun. 277, the party who had furnished necessary supplies to the wife was held entitled to recover to the extent of her separate maintenance. She had, it is true, given a bond, but only for £60; the court, however, held the creditor entitled to a larger sum, the separate maintenance exceeding the amount of the bond.

But the present is by no means a case of mere general charge. If it were, I have no doubt that the claim would well lie; but there are written promises. I hold a retainer in writing to imply a promise to pay whatever shall be reasonably and lawfully demanded by the solicitor or attorney acting under that retainer. So if there be no formal retainer, but only a written acknowledgment or adoption of the professional conduct, or instructions in writing to proceed further, the party who gives such written instructions, in effect promises to pay whatever may lawfully become due to one acting in obedience to them, that is, to pay the costs which shall be taxed. The present case is, in almost the whole, if not the whole of it, covered by such written authority, although such written authority was not necessary to bind Mrs. Barlee's separate estate. I am of opinion, therefore, that the decree of his Honor ordering the solicitor's bill to be taxed is well founded.

Nothing could more effectually defeat the very purpose of such settlements than denying power to the wife thus to charge her estate. She is meant to be protected by the separate provisions from all oppression and circumvention, and to be made independent of her husband as well as of all others. If she cannot obtain professional aid, and that with the facility which other parties find in obtaining it, she is not on equal terms with them. If the husband or the trustees can hold her at arm's length, and refuse her the proceeds of the fund held by them for her use, and if they can by a verbal retainer engage a solicitor, while she can only obtain such help by executing a mortgage or by granting bonds or notes, she is not on the same footing with them. I hold, therefore, that, so far from a solicitor's or attorney's bill being less entitled to favour in courts of equity when sued upon, as against the separate estate of a married woman, the argument is all the other way.

I have no doubt at all on any part of this case, into which I have only gone at large from its alleged novelty, and its importance in principle; and I affirm the decree with costs.

YALE v. DEDERER.

1860. 22 *New York*, 450.¹

SELDEN, J.

To dispose of this case, therefore, we have only to ascertain whether a married woman having, prior to the statutes of 1848 and 1849, a separate equitable estate, could create a charge upon that estate, by giving a promissory note for the debt of her husband, intending thereby to charge her estate, but without indicating this intention in any manner by the contents of the note. It was settled, when the case was here before, that the bare giving of such a note did not bind the estate. It becomes necessary now to inquire whether the additional fact, that the wife, at the time of making the note, intended to charge her separate estate, changes the rule.

[As to the views expressed in the English courts, in regard to the effect of the contracts of married women upon their separate estates.]

If the instrument by which the estate was created, conferred upon the wife either a general or qualified power of disposition, no one ever questioned her rights to execute this power; the doubts which arose, related to her right to dispose of or charge the property, independently of any such special authority; and this right was established soon after the introduction of such estates, upon the ground that the right of disposal was a necessary incident of the right of property.

That this universal *jus disponendi* was the sole and only foundation of the right in question is clear. Lord Thurlow, in the case of *Fettiplace v. Gorges* (3 Bro. C. C. 8), places the right upon this ground, and no other basis has ever been suggested for it. Assuming this then to be the foundation of the right, it is plain that the wife, to avail herself of it, must make some disposition of the specific property itself. It is clearly impossible to deduce, from the *jus disponendi*, which accompanies all rights of property, power to make any contracts, except such as related directly to the property to which the right of disposition is attached; and yet the Master of the Rolls, in *Norton v. Turvill* (2 Pr. W. 144), and in *Stanford v. Marshall* (2 Atk. 69), held the separate estate of a married woman liable for the payment of her bond, although the bond in no manner referred to such separate estate; and in the latter case was given for money lent to the husband.

[In *Bolton v. Williams*, 2 Vesey, 138, Lord Chancellor Loughborough] denied the liability of a married woman's separate estate for her general parol engagements, and explained the previous cases upon the ground, that the securities which the wife had executed operated

¹ Statement omitted, also portions of opinion. — ED.

as appointments of her separate property, that is, as appropriations or pledges of such property for the payment of the debt for which the security was given.

This new theory that a written security was an appointment was as plainly erroneous as that for which it was substituted. It was evidently a pure fiction. The doctrine proceeded upon the assumption that a wife's separate estate is not liable for her general engagements, but only for such as are specifically charged upon it, and yet held it liable for a bond or note, which in no manner referred to such estate. If these written securities operated as appointments, then it must necessarily follow that every such security would create an equitable charge or lien upon the estate, from the time of its execution; still, they were uniformly treated not as specific liens, but as mere general debts, having no priority over other and later claims. It was expressly held by Sir John Leach, Master of the Rolls, in an anonymous case (18 Ves. 258), where the questions arose, that in such cases there was no priority, and that all the debts must be paid equally.

[The learned Judge then referred to *Murray v. Barlee*, and criticised Lord Brougham's explanation of the ground upon which it had been previously held, that the bond or note of a married woman, and upon which Lord Brougham there held that all her engagements, whether in writing or parol, were charged upon her separate estate.]

The reasoning by which her intention was supposed to be established was, that when a married woman gives her bond or note, or contracts a debt in any other manner, it must be presumed that she intended it to have some effect; and inasmuch as it is void at law, and can have no effect unless it is a charge upon her separate estate, it follows that she must intend it to be such a charge.

The intention here spoken of is not an intention which is proved by extraneous evidence *dehors* the contract, but an intention which is to be inferred from, and is therefore embraced in or manifested by, the contract itself. No court has ever held or intimated that parol evidence was admissible to prove that the bond or note of a *feme covert* was intended to be a charge upon her estate. To permit this would be in direct conflict with the rule which excludes all parol evidence offered to explain a written instrument. The intent, to be of any importance, must be a part of the contract: that is, the true meaning of the contract when justly interpreted must be, that the debt which it creates should be a charge upon the estate. This case, therefore, is not materially strengthened on the part of the plaintiff by the finding of the judge, that the defendant intended the debt to be a charge, as that intention, if it existed, forms no part of the note, which must be regarded as the only evidence of the contract.

But the reasoning of Lord Brougham in *Murray v. Barlee* has been since overthrown, and the doctrine based upon it is not now the doctrine of the English courts. In the case of *Owens v. Dickenson* (1 Craig. & Ph. 48), Lord Chancellor Cottenham appears to have seen

that there could be no real foundation for the assumption that because a married woman had executed a bond or note, or contracted a debt in any other form, therefore she must have intended to charge such debt upon her separate estate. He first shows, what, indeed, is very plain, that if the doctrine is sound, then every debt must become a specific lien upon the separate estate to be paid in the order of its priority : while Lord Brougham held that such debts are all to be paid *pari passu*. He then argues, very conclusively, to prove that a contract which is entirely silent as to the separate estate, and makes no reference whatever to its existence, cannot by any legal reasoning be shown to have been intended as a disposition of such estate.

After thus removing the only ground upon which every English Chancellor, from Lord Loughborough to Lord Brougham, had held a bond or note, and upon which the latter had held every other contract, to create a charge, Lord Cottenham proceeds to inaugurate an entirely new doctrine on the subject, which is, that equity lays hold of the separate property, and appropriates it to the payment of the debt ; not on account of anything contained in the contract ; not because the wife, by any agreement, either express or implied, has made the debt a charge ; but for reasons which I will give in the learned Chancellor's own words : "The separate property of a married woman being a creature of equity, it follows, that if she has a power to deal with it, she has the other powers incident to property in general, namely : the power of contracting debts to be paid out of it ; and inasmuch as her creditors have not the means at law of compelling payment of those debts, a court of equity *takes upon itself* to give effect to them, not as personal liabilities, but by laying hold of the separate property, as the only means by which they can be satisfied."

His [Lord Cottenham's] argument, when reduced to its simplest terms is, that a married woman who has a separate estate, has power in equity to charge any debt she may incur upon such estate ; and inasmuch as the general creditors of such married woman, whose debts have not been thus charged, have no other means of collecting them, equity takes hold of the separate estate, and appropriates it to their payment.

Can this be sound? I am unable to see any logical connection between the premises and the conclusion. It may be very just, abstractly considered, that equity should thus dispose of the estate ; but it is clearly impossible to deduce the doctrine from the *jus disponendi* of the wife, which is its only foundation. The truth would seem to be that this mode of dealing with the estates of married women, to the extent to which it has been carried by the English courts, could not be sustained by any process of legal reasoning, and hence the grounds upon which it was made to rest have been repeatedly changed, and the rule itself has been fluctuating and uncertain.

If we desire precision and certainty in this branch of the laws, we must recur to the foundation of the power of a *feme covert* to charge her separate estate ; and this has heretofore arisen solely from her incidental power to dispose of that estate. Starting from this point, it is plain, that no debt can be a charge which is not connected by agreement, either express or implied, with the estate. If contracted for the direct benefit of the estate itself, it would, of course, become a lien ; upon a well founded presumption that the parties so intended and in analogy to the doctrine of equitable mortgages for purchase money. But no other kind of debt can, as it seems to me, be thus charged without some affirmative act of the wife evincing that intention ; and there is no reason why her acts in this respect should not be tested by the same principles and rules of evidence which are applied to similar questions in other cases.

[A majority of the court concurred in the opinion that the intention to charge the separate estate must be stated in the contract itself, or the consideration must be one going to the direct benefit of the estate.]

Judgment [in favor of plaintiff] *reversed, and new trial ordered.*

SECTION VI.

Suits by, or against, Wife.

SANKY v. GOLDING.

21 & 22 Elizabeth. *Cary's Reports in Chancery*, 124.

THE plaintiff setteth forth in her bill, that she joined with her husband in sale of part of her inheritance, and after, some discord growing between them, they separate themselves; and one hundred pounds of the money received upon sale of the lands was allotted to the plaintiff for her maintenance, and put into the hands of *Nicholas Mine*, Esquire, and bonds then given for the payment thereof unto *Henry Golding*, deceased, to the use of the plaintiff; which bonds are come to the defendant, as administrator to the said *Henry Golding*, deceased, who refuseth to deliver the same to the plaintiff, and hereupon she prayeth relief; the defendant doth demur in law, because the plaintiff sueth without her husband; and it is ordered the defendant shall answer directly: *Mary Sanky*, alias *Walgrave*, plaintiff, *Golding* defendant. Anno 21 & 22 Eliz.

LADY ELIBANK v. MONTOLIEU.

1801. 5 Vesey Junior, 737.¹

LADY *Cranstoun* died intestate, possessed of large personal property. Lady *Elibank*, as one of the next of kin, was entitled to a share of the personal estate. The defendant *Montolieu*, who was administrator of the estate of Lady *Cranstoun*, claimed to retain Lady *Elibank's* share towards satisfaction of a debt due to him from her husband, Lord *Elibank*. A settlement had been made upon Lady *Elibank* previous to her marriage; but the provision thus made for her was not adequate to the fortune she then possessed.

The present bill was filed by Lady *Elibank* against her husband, Lord *Elibank*, and against *Montolieu*; praying an account of the plaintiff's share, and that it may be settled on her and her family.

The Solicitor General, Mr. *Grant*, and Mr. *Alexander*, for the plaintiff.

The Attorney General, Mr. *Mansfield*, and Mr. *W. Agar*, for the defendant *Montolieu*.

LORD CHANCELLOR [LORD LOUGHBOROUGH]. The only difficulty I had in this cause was upon the form of the suit; whether a married woman

¹ Statement abridged. Arguments omitted. — Ed.

by her next friend could be the plaintiff in this court. With respect to the point made by the answer of Montolieu, that he had a right to retain against the debt of the husband, being possessed of the fund as administrator, and the wife being one of the next of kin, I am very clearly of opinion, the defendant had no right to retain. The administrator is trustee for the next of kin: the plaintiff being one of them, if she has any equity against her husband with regard to this money, that equity will clearly bar any right of retainer he can set up to the property, of which he became administrator. With respect to the only difficulty I had, upon the point of form, if she is entitled, and there is no way of asserting her right against her husband except by a bill, that objection, I think, does not weigh much. If the defendant Montolieu had done what would have been the natural thing, and the right thing, and what he certainly would have done, but for his own interest, he would have been the plaintiff, desiring the court to dispose of the fund, and for her benefit, to protect her interest in it. Then upon all the circumstances it is very clear, if it had come before the court, it would have been matter of course to have pronounced upon her equity upon the bill of the administrator, praying, that the money in his hands might be properly disposed of; and I would not have suffered this money to be paid to Lord Elibank without making a provision for her, for the provision upon her marriage was clearly not adequate to her fortune; and it is clear, that provision was made upon the expectation, that by circumstances to occur in his family there would be an opportunity to do better for her at a future period. The difficulty was, that it is very unusual in point of form; the bill coming on the part of the wife instead of the husband.

Declare, that the defendant Montolieu is not entitled to retain in satisfaction of the debt due from the defendant Lord Elibank to him; but that the distributive share of Lady Cranstown's fortune, accruing to the plaintiff as one of her next of kin, is subject to a farther provision in favor of the plaintiff and her children; the settlement made upon her marriage being inadequate to the fortune she then possessed. Refer it to the Master to take the accounts, and to see a proper settlement made upon the plaintiff and her children; regard being had to the extent of her fortune and the settlement already made upon her.

SECTION VII.

Contracts and Conveyances between Husband and Wife.

SLANNING v. STYLE.

1734. 3 Peere Williams, 334.

Cross bills, between the widow of Robert Style and his three sisters. The sisters were his residuary legatees and executors.

[Omitting other questions.]

Another thing insisted upon on behalf of the defendant, the widow, was, that the testator allowed his first wife to dispose and make profit of all such butter, eggs, poultry, pigs, fruit, and other trivial matters arising from the said farm (over and besides what was used in the family), for her own separate use, calling it her *pin-money*; and upon the death of the first wife, and until the testator married the defendant Style, the testator's sister the defendant Pelling kept his house, and had the same allowance, which was also continued to the defendant the widow, after her marriage, by way of *pin-money*; and it was proved in the cause, that her husband, whenever any person came to buy any fowls, pigs, &c., would say, he had nothing to do with those things, which were his wife's; and that he also confessed, that having been making a purchase of about £1,000 value, and wanting some money, he had been obliged to borrow £100 of his wife to make up the purchase-money; therefore now the widow claimed to be paid this £100.

To which it was answered, that here was no deed touching this agreement, nor any writing whatsoever, whereby to raise a separate property in a *feme covert*, which was what the law did not favour; that it was no more than a connivance or permission, that the wife should take these things, and continue to enjoy them during his (the husband's) pleasure, which pleasure was determined by his death; besides, this agreement being after marriage, was but a voluntary one, for which a court of equity usually leaves the party to take his remedy at law; and that, in truth, the husband's borrowing this £100 of his wife, was no more than borrowing his own money.

But the LORD CHANCELLOR [Lord TALBOT] decreed, that the widow, the defendant, was well entitled to come in for this £100 as a creditor before the Master; observing, that the courts of equity have taken notice of and allowed *feme coverts* to have separate interests by their husbands' agreement: and this £100 being the wife's savings, and here being evidence, that the husband agreed thereto, it seemed but a reasonable encouragement to the wife's frugality, and such agreement would be of little avail, were it to determine by the husband's death; that it was the strongest proof of the husband's consent, that the wife should

have a separate property in the money arising by these savings, in that he had applied to her, and prevailed with her to lend him this sum; in which case he did not lay claim to it as his own, but submitted to borrow it as her money.

Wherefore, and especially as here was no creditor of the husband to contend with, it was ordered, that the wife should be allowed to come in for this £100, as a creditor before the Master; and the court cited the case of *Calmady v. Calmady*, where there was the like agreement made betwixt the husband and wife, that upon every renewal of a lease by the husband, two guineas should be paid by the tenant to the wife, and this was allowed to be her separate money.

SHEPARD v. SHEPARD.

1823. 7 *Johnson Chancery (New York)*, 57.¹

BILL by the widow of Hazel Shepard against the son of H. S.

Before the marriage of H. S. and the plaintiff, in 1806, the plaintiff executed a deed to H. S., reciting their intended marriage and releasing to him all right of dower in his estate, real or personal, by virtue of the marriage. H. S., who then owned real estate, executed, on the same day, a deed to the plaintiff, engaging that, if they should purchase any real estate during their marriage, the plaintiff should have a right of dower in the same. After the marriage, in 1808, H. S. deeded to the plaintiff, in consideration of natural affection and to make provision for her when a widow, a lot of land to hold during her widowhood. In 1817, H. S. executed a deed to the defendant his son, releasing to him the same land which he had deeded to the plaintiff in 1808. Defendant did not pay a full consideration for this deed. Upon receiving this deed in 1817, the defendant by deed released to H. S. during his life, 48 acres of the land described in the deed of H. S. to the defendant; and the defendant covenanted with H. S. to pay an annuity of \$60.00 to the plaintiff during widowhood, on condition of plaintiff's releasing to defendant all right as widow of H. S., or by virtue of any deed, to the estate of H. S.

H. S. died in 1819. Plaintiff remains his widow, without any provision for her support. The defendant is in possession of the aforesaid land; and the plaintiff, having brought an action against him, upon the deed from H. S. to her, the defendant set up in defence that the deed was void in law. The plaintiff had offered to release to the defendant all her right to the estate of H. S. mentioned in the deed, provided the defendant would pay her the annuity, which he refused to do. No land was purchased by H. S. and the plaintiff during their marriage.

The bill prayed, *inter alia*, that the defendant be decreed to release

¹ Statement abridged. Only so much of the report is given as relates to a single point. — Ed.

to the plaintiff all his right to the land described in the deed of 1808, for her life or widowhood ; and to deliver the possession thereof, and account for the rents and profits from the death of H. S.

The cause was heard upon the bill and answer ; the facts appearing therefrom being substantially as above stated.

J. Paine, for plaintiff.

W. Raleigh, for defendant.

KENT, CHANCELLOR.

The deed from H. S. to the plaintiff, was undoubtedly void in law, for the husband cannot make a grant or conveyance directly to his wife, during coverture. (Co. Litt. 3 a.) And in equity, the courts have frequently refused to lend assistance to such a deed, or to any agreement between them. Thus, in *Stoit v. Ayloff* (1 Ch. Rep. 33), the husband promised to pay his wife £100 ; they separated, and she filed her bill for that sum. But the court would not relieve the plaintiff, "because the debt was sixteen years old, and the promise made by a husband to a wife, which the court conceived to be utterly void in law." Again, in *Moyse v. Gyles* (2 Vern. 385, Prec. in Ch. 124), the husband made a grant or assignment of his interest in a church lease, to his wife ; she brought a bill, after his death, to have to the defective grant supplied, and the court held the grant to be void in law, and dismissed the bill, as the grant was voluntary and without consideration. So, in *Beard v. Beard* (3 Atk. 72), the husband, by deed poll, gave to his wife all his substance which he then had, or might thereafter have. Lord Hardwicke considered the deed poll to be so far effectual, as to be a revocation of a will, by which the testator had given all his estate to his brother ; yet that it could not take effect as a grant or deed of gift to the wife, "because the law will not permit a man to make a grant or conveyance to the wife, in his lifetime, neither will this court suffer the wife to have the whole of the husband's estate, while he is living, for it is not in the nature of a provision, which is all the wife is entitled to."

It is to be observed, that none of these cases were determined strictly and entirely upon the incapacity of the husband to convey to the wife, according to the rule of law ; and they do not preclude the assertion of a right, in a court of equity, under certain circumstances, to assist such a conveyance. The court relied upon the staleness of the demand in the first case, and upon the want of consideration in the second, and upon the extravagance of the gift in the third, as also constituting grounds for the decree ; and it is pretty apparent, that if the grant in each case had been no more than a suitable and meritorious provision for the wife, the court would have been inclined to assist it. In *Slanning v. Style* (3 P. Wms. 334), Lord Talbot said, that courts of equity have taken notice of, and allowed *feme covert*s to have, separate interests by their husbands' agreement, especially where the rights of creditors did not interfere. And in *More v. Ellis* (Bunb. 205), articles of agreement, executed between husband and wife, were held binding without the intervention

of trustees. So, in *Lucas v. Lucas* (1 Atk. 270), Lord Hardwicke admitted, that, in Chancery, gifts between husband and wife have often been supported, though at law the property is not allowed to pass; and he referred to the case of Mrs. H. and to that of Lady Cowper. And in the very modern case of *Lady Arundel v. Phipps* (10 Ves. 146, 149), Lord Eldon held, that a husband and wife, after marriage, could contract, for a *bona fide* and valuable consideration, for a transfer of property from the husband to the wife, or to trustees for her.

The consideration for the deed to the wife, in the case before me, was very meritorious. It was "natural affection, and to make sure a maintenance for the said Anna S., wife and consort of H. S., in case she should survive him." She had been induced, prior to the marriage, to release to H. S. all right and claim of dower to arise under the intended marriage, and the consideration for this release, was an engagement on his part, that she should have dower in any real estate to be purchased by them "by their prudence and industry during the cohabitation." But no estate was purchased by them by those means, and, according to the literal terms of those deeds, she was barred of her dower without any substitute. The deed to the wife, of certain lands, being part and parcel of his estate, for and during her widowhood, was, therefore, no more than a just and suitable provision, and one that a court of equity can enforce consistently with the doctrine of the cases. The defendant does not stand in the light of a creditor, or of a purchaser for a valuable consideration without notice, and we have none of the difficulties before us, which such a character might create. He does not deny notice of the existence of the deed to the plaintiff, when he received the deed of the same lands from H. S.; and he does not pretend that he gave any thing more than the nominal consideration of 25 dollars, though the consideration of 1000 dollars was inserted in the deed. The fact that he did, on the day of the date of that deed, reconvey the lands to H. S., his father, for life, and did annex thereto a covenant to pay to the plaintiff an annuity of 60 dollars, during her widowhood (and which he now says is more than the annual value of the land), is decisive evidence that he took the land of his father, *with knowledge* of the equitable claim of the plaintiff, and with an engagement on his part, to give her a reasonable compensation in extinguishment of that claim.

I conclude, accordingly, that the deed from the husband to the wife, may and ought, in this case, to be aided and enforced by this court. This would seem to be the most safe and effectual relief to her, and it is one that her husband intended, before the alienation of his affections. The defendant would deprive her not only of her rights under this deed, but of all right and title to dower, by reason of her ante-nuptial release, and also of all compensation, in lieu of dower, under his covenants, which were made to the husband, and by him subsequently released.

[Remainder of opinion omitted.]

Decree accordingly.

SECTION VIII.

*Suits between Husband and Wife.*¹

SIR ROBERT BROOKS v. LADY BROOKS ET AL.

1691. *Precedents in Chancery*, 24.

SIR *Robert Brooks* was Plaintiff against his Lady and others, and a Motion was made to have her committed, for not answering Interrogatories, but the Court would not grant it, and declared a Man could not be Plaintiff in this Court against the Wife. On *Saturday* following this Matter was moved again, and then the Court was of Opinion, that tho' a Man could not have a Bill against his Wife for Discovery of his own Estate; yet, where before Marriage she enters into Articles concerning her own Estate, she has made herself as a separate Person from her Husband, and therefore she was ordered to answer in a Week's Time.

¹ See also *Lady Elibank v. Montolieu*, ante, p. 505. — ED.

CHAPTER III.

HUSBAND AND WIFE UNDER MODERN LEGISLATION.

["So unsatisfactory has the common-law system of husband and wife been found that all the States have availed themselves of their . . . power to change the law, and now statutes are the most important of all the sources of the law to be consulted." Stewart's Law of Husband and Wife, Art. 9. At the present time, "the main difficulty in the administration of the law of husband and wife lies in ascertaining the meaning and effect of statutes." Stewart, Art. 11. There are peculiar troubles owing to the fragmentary and gradual manner in which legislatures have dealt with this subject. The attempt has generally been "to sunder the common-law unity in part but not in whole." 2 Bishop's Law of Married Women, Section 7. And in the older States it has been piece-meal legislation; at first aiming only at changes in certain property rights; and afterwards undertaking to enlarge the general legal capacity of the wife. In most States, "legislation has proceeded by steps, and not by a single bound, to its present position." Some of the perplexities in construing such legislation "cannot be got rid of by any improvement in drafting; they can be removed only by the [legislative] adoption of the broad principle that a married woman's rights and liabilities are the same as those of a *feme sole*." 7 Law Quarterly Review, 4. (And compare 2 Bishop, Section 7.) The greatest difficulty arising in connection with these statutes consists, not so much in determining the meaning of the words used in making specific changes, as in determining how far the statutory changes expressly made affect other parts of the common law not in terms dealt with by the legislature. The trouble is largely as to matters upon which the statutes are silent. Much controversy has taken place in regard to the collateral, or incidental, effect of the changes which have been expressly made. If those express changes destroy the principal reasons for some common-law doctrine not named in the statute, does that doctrine continue to survive the original reasons for its existence, or is it impliedly repealed? Suppose that a statute secures to the wife all her property and all her earnings, as fully as if she were single; and also provides that she may sue and be sued. Is the husband still liable for her support; or for her ante-nuptial contracts; or for her torts, either ante-nuptial or post-nuptial? Or suppose that a statute confers upon the wife in express terms the general capacity to contract as if she were single. Is a contract between the husband and wife valid? In recent years some of the doubts as to the incidental effect of legislation have been solved by amendatory statutes; but few States have thus got rid of all these difficulties.

Upon this subject the statutes of the various States "differ indefinitely." In 1885 Mr. Stewart asserted that no two States had made precisely the same legislative changes in the common law of husband and wife. The statutory provisions of the different States in force Jan. 1, 1886, are summarized in 1 Stimson's Amer. Statute Law. (See especially Articles 640, 641, 642, 644, 645, 646, 647, 648, 650, 652; pages 715-748.) The history of legislation on

this topic is well outlined by Mr. Hitchcock, in 6 Southern Law Review, New Series, pp. 649-662.

No attempt is made in this volume to give all the leading decisions in any one State; or to give decisions illustrating all the important points which have been discussed under "married woman statutes." The cases collected in this chapter do, however, deal with some of the more important questions arising under such legislation;¹ and, what is of great value, illustrate the temper in which courts have been wont to approach the interpretation of statutes which were supposed by their framers to depart widely from common-law ideals.

In order to afford some idea of the course of legislation, and of the difference between the earlier and later enactments, the New York statutes of 1848 and of 1896 are given, in substance, below. — ED.]

NEW YORK LAWS OF 1848. CHAPTER 200.

AN ACT for the more effectual protection of the property of married women.

§ 1. The real and personal property of any female who may hereafter marry, and which she shall own at the time of marriage, and the rents, issues and profits thereof, shall not be subject to the disposal of her husband, nor be liable for his debts, and shall continue her sole and separate property, as if she were a single female.

§ 2. The real and personal property, and the rents, issues, and profits thereof, of any female now married shall not be subject to the disposal of her husband; but shall be her sole and separate property as if she were a single female except so far as the same may be liable for the debts of her husband heretofore contracted.

§ 3. It shall be lawful for any married female to receive, by gift, grant, devise or bequest, from any person other than her husband, and hold to her sole and separate use, as if she were a single female, real and personal property, and the rents, issues and profits thereof, and the same shall not be subject to the disposal of her husband, nor be liable for his debts.

§ 4. All contracts made between persons in contemplation of marriage shall remain in full force after such marriage takes place.

NEW YORK LAWS OF 1896. CHAPTER 272.

Section 20. **Property of Married Woman.** — Property, real or personal, now owned by a married woman, or hereafter owned by a woman at the time of her marriage, or acquired by her as prescribed in this chapter, and the rents, issues, proceeds, and profits thereof, continues to be her sole and separate property as if she were unmarried, and is not subject to her husband's control or disposal nor liable for his debts.

Section 21. **Powers of Married Woman.** — A married woman has all the rights in respect to property, real or personal, and the acquisition, use, enjoyment, and disposition thereof, and to make contracts in respect thereto with any person including her husband, and to carry on any business, trade or occupation, and to exercise all powers and enjoy all rights in respect thereto and in respect to her contracts, and be liable on such contracts, as if she were unmarried; but a husband and wife cannot contract to alter or dissolve the marriage or to relieve the husband from his liability to support his wife.

¹ It should be stated that the subject of community property is not included in this collection of cases. — ED.

Section 23. **Contracts in Contemplation of Marriage.** — A contract made between persons in contemplation of marriage remains in full force after the marriage takes place.

Section 24. **Liability of Husband for ante-nuptial Debts.** — A husband who acquires property of his wife by ante-nuptial contract or otherwise is liable for her debts contracted before marriage, but only to the extent of the property so acquired.

Section 25. **Contract of Married Woman not to bind Husband.** — A contract made by a married woman does not bind her husband or his property.

Section 26. **Husband and Wife may convey to Each Other or make Partition.** — Husband and wife may convey or transfer real or personal property directly, the one to the other, without the intervention of a third person; and may make partition or division of any real property held by them as tenants in common, joint tenants, or tenants by the entireties. If so expressed in the instrument of partition or division such instrument bars the wife's right to dower in such property, and also, if so expressed, the husband's tenancy by curtesy.

Section 27. **Right of Action by or against Married Woman for Torts.** — A married woman has a right of action for an injury to her person, property, or character, or for an injury arising out of the marital relation, as if unmarried. She is liable for her wrongful or tortious acts; her husband is not liable for such acts unless they were done by his actual coercion or instigation; and such coercion or instigation shall not be presumed but must be proved. This section does not affect any right, cause of action, or defense existing before the eighteenth day of March, 1890.

SECTION I.

Wife's Right to Use and Control Her Separate Property.

(a) REAL ESTATE.¹

PARENT v. CALLERAND.

1872. 64 *Illinois*, 97.²

ERROR to the Circuit Court of St. Clair county.

Florence Callerand, a married woman, leased to Parent for ten years certain land which had been assigned to her as dower in the estate of a former husband. She afterwards gave Parent notice to quit at the end of the first year. Upon complaint brought by Mrs. Callerand

¹ As to the effect of married women's separate property acts upon "estates by entireties," there is a conflict of authority. Some states hold that a conveyance which would formerly have created an estate by entireties will still have that effect. Others hold the contrary. Reference may be made to *Diver v. Diver*, 1867, 56 Pa. State, 106, and *Walthall v. Goree*, 1860, 36 Ala. 728, as cases representing the conflicting views. The question may, of course, be put beyond doubt by the explicit terms of a statute.

"Where it is settled that separate property acts do not destroy estates by entireties with their essential incidents of inseverableness and survivorship, how far they affect the husband's rights over such estates during coverture is a different question." Stewart on Husband and Wife, s. 308. — Ed.

² Statement abridged. Part of opinion omitted. — Ed.

against Parent, charging him with forcibly detaining the possession, the Circuit Court gave judgment for the plaintiff, awarding a writ of restitution.

Wm. Winkelman, for plaintiff in error.

R. A. Halbert, for defendant in error.

SCOTT, J.

The only point made by counsel is, whether a married woman can execute a lease on her separate real estate for a term of years that will be binding during coverture, without her husband joining in the execution or consenting thereto. We are of opinion that she can.

We attach no importance to the fact that the lease in this instance is under seal and was regularly acknowledged. A lease not under seal or acknowledged would be of equal validity with the one in this record and would be no more and no less binding on the defendant in error.

By the act of 1861, it is provided that "all the property, both real and personal, belonging to any married woman as her sole and separate property, . . . together with all the rents, issues, increase and profits thereof, shall, notwithstanding her marriage, be and remain, during coverture, her sole and separate property, under her sole control, and be held, owned, possessed and enjoyed by her the same as though she was sole and unmarried."

This statute makes a marked change in the common law in regard to the separate property of married women. It was doubtless intended to and does confer upon a married woman the right to enjoy the rents and profits of her separate estate independently of and free from any interference on the part of her husband; and if it shall accomplish this purpose, it must be construed to confer all power necessary to carry into effect the intention of the legislature in its passage. It is not to be supposed that the act of 1861 confers upon married women the power to enter into contracts generally, or that it alters the common law in that regard except so far as it may be necessary to effectuate the right conferred, viz.: the enjoyment of her separate estate, notwithstanding her marriage, the same as though she was sole and unmarried.

This act, like all other statutes, must have a reasonable construction. A law that confers the right to the enjoyment of her separate estate does not, by mere implication, necessarily confer the power on a married woman to sell and convey her real estate without the consent of her husband, and so it was held in *Cole v. Van Riper*, 44 Ill. 58. As was said in that case, "the power to own and enjoy is entirely different from the power to dispose of, and the latter is not necessary to the exercise of the former." The words "hold, own, possess and enjoy," used in the statute, would seem to imply that the legislature intended to confer with the right the power also to enable a married woman to lease for a time or term of years any lands which she may own in her own right. If she does not possess this power, then indeed

She can not own, possess and enjoy her separate estate "the same as though she was sole and unmarried." A state of case might arise in which there would be no way in which she could avail of the rents and profits of her real property unless the law confers the authority to lease the same without the consent of the husband to such leasing. It would be a narrow and illiberal construction of the statute to hold that a married woman must herself cultivate and farm her lands to enable her to appropriate to herself the profits and increase accruing therefrom.

In construing this statute in regard to the rights of married women, it was said by this court, in *Carpenter et al. v. Mitchell*, 50 Ill. 470, "if she owns houses she must be permitted to contract for their repair or rental. If she owns a farm she must be permitted to bargain for its cultivation and to dispose of its products."

It is obvious that the legislature, in thus conferring upon a married woman the right to own, possess and enjoy her separate real estate, intended to and did so modify the common law that she could, in her own name and in her own right, contract in regard thereto to effectuate that object. If such was not the case, the provision in her behalf would be a mere barren right, fruitless of any good results. The true construction of the act in question is that, by implication at least, she has power under the statute to make all such contracts in regard to her real estate as may be necessary to its full and complete enjoyment. Under the power thus conferred no reason is perceived why a married woman may not execute in her own name a lease for a term of years upon any lands which she may own, without her husband joining in the execution or consenting thereto, that will be as binding during coverture as though she was sole and unmarried.

It being lawful for her to so contract in regard to her own property, she can not be permitted to retract whenever she may happen to make a disadvantageous bargain. Like other persons, she must abide the consequences of her own contracts in regard to subjects about which it is lawful to contract, and which have been fairly made without any fraudulent practices.

The law will enforce such a contract on her behalf when it is to her advantage to have it done; and if she avails of the benefits, she can not be heard to complain that the courts will enforce a like contract against her.

In the present instance no reason is assigned by the defendant in error why she seeks to rescind the contract, except that it is not binding in law. It appears from the agreed statement of facts that the plaintiff in error had complied in every particular with the terms of the lease, and she could not capriciously repudiate it. It was a contract in regard to her separate property, fairly entered into, and it must be held to be valid in law and binding on both parties.

The judgment finding the defendant in the court below guilty was contrary to the law and the evidence, and must be reversed and the cause remanded.

Judgment reversed.

(b) CHATELS.

SOUTHARD v. PLUMMER.

1853. 36 Maine, 64.¹

ON exceptions from *Nisi Prius*, SHEPLEY, C. J., presiding.

Trespass for breaking and entering the plaintiff's close, and carrying away therefrom several articles of his personal property.

In March, 1848, the plaintiff married a woman who owned a farm, with a house upon it, and articles of furniture and other personal property.

Testimony was introduced tending to show, that after the marriage and while the plaintiff and his wife were residing together in the house, the defendants entered and removed from the house the articles as mentioned in the declaration of the plaintiff's writ.

The defendants introduced evidence tending to prove that the articles belonged to the wife before and at the time of the marriage, and that it was by her order that they entered the house and carried them away.

The jury were instructed, that if the real estate entered upon and the articles of property taken, were the property of the wife before the marriage, and if the entry and taking were by her direction and under her inspection, the action was not sustainable. To that instruction the plaintiff excepted, the verdict having been against him.

[The material provisions of the statute are given in the opinion.]

Ingalls, for plaintiff.

[Argument omitted.]

Ruggles, for plaintiff.

The question therefore is solely upon the statute of 1844. That statute, being so widely in derogation of common law rights, is to receive a strict construction. To the statute itself, I make no objection. My objection is merely to the construction of it claimed by the plaintiff's counsel.

In view of the immense importance to domestic happiness, it is not to be supposed, that the Legislature could intend the entire removal from the husband of all oversight and control of the wife's personal estate. It would at once degrade and discharge the marital relation, set the parties at variance, and in all cases facilitate, and in many cases require a separation. If the husband, from any misfortune, become poor, she may deny him bread, and transfer him to the poor house, while herself luxuriating in wealth. He may be expelled from the house, and her paramour substituted to the possession. It is a divorce of the husband, without notice of the process.

¹ Statement abridged. Part of argument omitted. — ED.

The construction, claimed by the defendants, with all its boasted tenderness and humanities, degrades the domestic relation and is fraught with mischiefs, which if not immediately developed, will leave terrific marks upon the next age.

[Remainder of argument omitted.]

Lowell and Carleton, for defendant.

WELLS, J. Both the real and personal property in reference to which the trespass is alleged to have been committed, belonged to the wife of the plaintiff at the time of the coverture, and when the acts, of which complaint is made, were done by the defendants. They acted under the authority of the plaintiff's wife, and the question presented is, whether they were justified in conforming to her orders and directions.

By the common law the husband has a freehold estate in the real property of the wife, and the use and control of it, and by the marriage the title to personal chattels in her possession passes to him.

By the Act of March 22, 1844, c. 117, § 2, it is provided, that "hereafter when any woman possessed of property, real or personal, shall marry, such property shall continue to her notwithstanding her coverture, and she shall have, hold and possess the same, as her separate property, exempt from any liability for the debts or contracts of the husband."

The phrase "such property shall continue to her notwithstanding her coverture," implies that it shall remain her property, and that the coverture shall not deprive her of it, and the possession of it "as her separate property" gives her an entire dominion over it. This language could not have been employed simply for the purpose of exempting the property from attachment for the debts of the husband, and from liability on his contracts. It is very evident, that something more was intended, that her right of property and control over it should remain, not only against the creditors and contracts of the husband, but against the husband himself.

This construction is strengthened by the terms of the third section of the Act, which provides, that "Any married woman possessing property by virtue of this Act, may release to the husband the right of control of such property, and he may receive and dispose of the income thereof; so long as the same shall be appropriated for the mutual benefit of the parties." The control of the property having been given to the wife, it then became necessary by further legislation to authorize her to release it to the husband.

And as the wife of the plaintiff did not release it to him, it continued to her and she could direct the defendants to enter upon the real estate, and take and carry away the personal property. It would be doing violence to the language and spirit of the Act to say, that it did not confer upon the wife the control of the property independently of her husband. And she might exercise that control herself personally, or through the agency of another. The statute having given to her the direction and management of her property, would necessarily and by

implication clothe her with all the power requisite for the performance of those acts, and would justify the defendants, who were employed by her.

Exceptions overruled.

HOWARD and HATHAWAY, JJ., concurred. RICE, J., dissented.

AGO v. CANNER.

1897. 167 *Massachusetts*, 390.

TORT, for the conversion of certain household goods, alleged to be the property of the plaintiff. Trial in the Superior Court, without a jury, before MASON, C. J., who allowed a bill of exceptions, in substance as follows.

While the plaintiff was away on a visit, she left the property in question on the premises hired by her husband, who, being in sole possession, went to the defendant, told him that his wife had been dead for three months, and asked him to sell his household property. Thereupon he took the defendant to the premises, showed him the property, and then sold and delivered it to the defendant, who took possession, moved the property to his store in Boston, and sold it, the defendant having no knowledge of the wife's existence until a week afterwards, and after a part of the goods so purchased had been sold.

The defendant offered to show that the husband of the plaintiff had reduced the personal property sued for to his own possession, and then sold the same to the defendant. The judge ruled that this would constitute no defence to the action, and the defendant excepted.

The defendant also requested the judge to rule that a husband has a right to reduce the personal property of the wife to his possession, and the property then becomes the property of the husband; and that the act of the husband in selling and delivering the property to the defendant was a reduction to his possession, and conveyed a good title to the defendant. The judge declined so to rule, and the defendant excepted.

The defendant further requested the judge to rule that, the husband having sold the personal property and delivered it to the defendant, the defendant acquired a good title, and that the action could not be maintained. The judge declined so to rule; and the defendant excepted. *97 aff.*

H. D. Gove & J. M. Gove, (F. W. Fancher with them,) for the defendant, submitted the case on a brief.

C. F. Appleton Smith, for the plaintiff.

ALLEN, J. The property belonged to the plaintiff. Her title to it was never lost. In this Commonwealth, a husband no longer has a right to make his wife's personal property his own, by reducing it to his own possession. Her husband's acts did not deprive her of her title, or of her right to maintain an action to enforce her title. Pub.

Sts. c. 147, § 1;¹ *McCowan v. Donaldson*, 128 Mass. 169; *Pacific National Bank v. Windram*, 133 Mass. 175; *Butler v. Ives*, 139 Mass. 202; *Harmon v. Old Colony Railroad*, 165 Mass. 100.

Exceptions overruled, with double costs.

(c) CHOSSES IN ACTION.

GRASON, J., IN *BARTON v. BARTON*.

1869. 32 *Maryland*, 214, pp. 223-225.

GRASON, J. . . . The marriage between William A. and Caroline Barton took place after the adoption of the Code, and the first, second and third sections of the 45th Article of the Code provide that a married woman shall hold, to her sole and separate use, all the property, real and personal, which may belong to her at the time of the marriage, or which she may thereafter acquire by gift, grant, devise, bequest, or in a course of distribution, with the power of devising the same as fully as if she were a *feme sole*. It is not necessary for her to have a trustee to secure to her the sole and separate use of her property, but the legal title thereto is, by law, vested in her. The fourth section confers upon a married woman, having no trustee, the right to sue, by next friend, in a Court of Law or Equity, in all cases for the recovery, or security, or protection of her property as fully as if she were a *feme sole*.

action was. It was also contended that the choses in action, belonging to the wife, are not property within the meaning of the Code, and that, therefore, no power is conferred upon her to maintain an action for the recovery of their value. We have no doubt that judgments, notes or other securities and accounts, taken by the wife upon the sale, or other disposition of her separate estate, or for services rendered, or work done by her, and all choses in action held by her at the time of her marriage or acquired subsequently, are property within the meaning of the Code, for the recovery, security or protection of which she can maintain an action.

¹ "The real and personal property of a woman shall upon her marriage remain her separate property, and a married woman may receive, receipt for, hold, manage, and dispose of property, real and personal, in the same manner as if she were sole, except that she shall not without the written consent of her husband destroy or impair his tenancy by the curtesy in her real estate." Public Statutes of Massachusetts, Chap. 347, Section 1. — Ed.

SECTION II.

Husband's Right as Administrator of Wife's Estate.

LEAKEY v. MAUPIN.

1847. 10 *Missouri*, 368.¹

fact
 77 Scott, J. This was a proceeding commenced in the County Court of Howard County by Maupin the appellee, to obtain from J. J. Leakey, administrator of Jeremiah Leakey, deceased, a distributive share in right of his wife of the estate of the said Jeremiah Leakey. In 1841, Maupin married S. Leakey, a daughter of the said Jeremiah, who died intestate in March, 1842. In October, 1842, Sarah Leakey, the wife of Maupin the appellee, departed this life without issue, leaving heirs preferred to her husband as distributee under our statute of descents and distributions. No distribution of the estate of her deceased father had been made at the time of the death of Sarah Leakey. The County Court refused Maupin a distributive share of said estate in right of his deceased wife, and on an appeal to the Circuit Court that judgment was reversed, and the cause brought here.

The only question arising under this state of facts is whether Maupin, the husband of Sarah Leakey, deceased, or her heirs, are entitled to her distributive share in the estate of her deceased father?

If this was a question depending upon the English law for its solution, it could not admit of any doubt. By that law the right of the husband as administrator to his deceased wife's choses in action not reduced into possession during the coverture would be unquestionable, but as some of the provisions of the English law in relation to this subject have been omitted and others varying from them have been incorporated into our system of laws, it becomes a question whether a husband under our law is entitled to his wife's choses in action not reduced into his possession during her life time, she leaving heirs preferred to the husband under our statute of distribution.

[After giving the history of English legislation; as to which see *Judge of Probate v. Chamberlain*, ante, p. 346.]

We have not adopted into our system of laws this section [section 25, of 29 Chas. II.], but on the contrary, it is provided by the statute of descents and distributions, § 3, that if there be no children nor their descendants, father, mother, brother nor sister, nor their descendants, nor any paternal or maternal kindred capable of inheriting, the whole shall go to the wife or husband of the intestate. From the omission of a provision similar to that contained in the 25th section of the act of 29th

¹ Arguments and part of opinion omitted. — Ed.

Chas. II., and the insertion of a provision that the husband should only receive his deceased wife's estate in the event of there being no children, father, mother, brother, sister, nor any maternal nor paternal kindred capable of taking, the inference would seem irresistible that it was not the intention of the Legislature that the husband should receive his wife's estate and not account for it as other administrators.

In this case Maupin claimed as husband and not as administrator of his wife. Our statute gives the right of administering on his deceased wife's estate to the husband, and had Maupin claimed a distributive share of J. Leakey's estate as administrator of his wife, he would have been entitled to recover, but for the reasons given before, he would have held the amount received as trustee for his wife's next of kin.

The other judges concurring, the judgment below is reversed, and it is considered that Maupin take nothing by his plaint, and that the appellant go hence without day and recover his costs.

SECTION III.

*Earnings of Wife.*¹

MERRILL v. SMITH.

1854. 37 Maine, 394.²ON exceptions from *Nisi Prius*, HOWARD, J., presiding.Trespass, against the late sheriff, for an act of his deputy in attaching a sleigh.It appeared in evidence, that defendant's deputy took the sleigh upon a legal precept against the husband of the plaintiff, and the question for the jury, was whether it belonged to her husband.

Testimony was introduced by the plaintiff tending to show, that she owned the sleigh, and by defendant, tending to show, that it was the property of her husband.

The jury were instructed, that if they were satisfied by the evidence, that the sleigh was purchased with property which the plaintiff acquired during coverture by her labor, that the sleigh thereby became the property of the husband, and was liable to be attached for his debts.The jury returned a verdict for the defendant, and the plaintiff excepted.
overruled

C. W. Goddard, in support of the exceptions.

Morrill and Fessenden, contra.

SHEPLEY, C. J. The Act approved on August 2, 1847, c. 27, provides, that a married woman may become the owner of real or personal property by bequest, demise, gift, purchase, or distribution. The purchase intended, is one made from her own property, or that of others by their consent for her use. Property would not become hers merely because she made the purchase on the credit or from the means of her husband. She must be presumed in such cases to act in her proper relation to him and for him. The husband does not by that act or others in *pari materia* cease to be entitled to the services of the wife. What she earns by her personal labor becomes his and not her property.In this case the instructions only denied "that property which the plaintiff acquired during coverture by her labor," would thereby become hers, so that it could be used by her for the purchase of other property in her own right.
Exceptions overruled.

RICE, HATHAWAY and CUTTING, JJ., concurred.

¹ See also *post*, Sections IX. and XVI. — ED.² Argument and part of opinion omitted. — ED.

II. I learned sleigh by her labor. It was attached for his debts. Held it was H's + J.A.

LEE v. SAVANNAH GUANO CO.

1896. 99 Georgia, 572.

LEVY and claim. Before Judge HART. Wilkinson Superior Court. October Term, 1895.

J. W. Lindsey and Estes & Jones, for plaintiff in error.

F. Chambers, *contra*.

LUMPKIN, J. An execution in favor of the Savannah Guano Company, against a partnership composed of Lee and two others, was levied upon certain land as the property of Lee, which was claimed by his wife. The property was found subject, and the claimant complains here of the overruling of her motion for a new trial. Although it contains numerous grounds, the case, upon its merits, involves a single question, viz.: that indicated in the first head-note. The record discloses that when Mr. and Mrs. Lee married, they owned no property, and were necessarily dependent upon their own labor for a support. Realizing their situation, and being very properly desirous of bettering their condition in life by the accumulation of property, they considered and discussed between themselves the question of dispensing with hired servants, and doing their own work, each to bear a fair share of the burden common to both. It was obviously contemplated that the husband should labor to procure for them the necessities of life, and that she should keep the household and its affairs in order. This is exactly what people in their circumstances ought to do, and their conduct was altogether praiseworthy. It further appears that they entered into an agreement by the terms of which Mr. Lee was to pay Mrs. Lee \$100 per annum in consideration of her consent to dispense with servants and her undertaking to perform with her own hands the ordinary household duties devolving upon a wife in her position. There was nothing wrong about this agreement, and if Mr. Lee had been able to pay her the stipulated sum per annum, and at the same time pay his debts, there would have been no difficulty about the matter. We cannot, however, bring ourselves to the conclusion that an agreement of this kind can be made effectual as against creditors of the husband. Mr. Lee failed to make the annual payments to his wife, as agreed; and when his alleged indebtedness to her had so accumulated as to amount to a considerable sum, he conveyed to her the land now in dispute in settlement and full satisfaction of her entire claim. This conveyance was made before the plaintiff in execution had obtained judgment against Lee upon a debt contracted by the latter prior to the settlement with his wife above mentioned.

Under the facts recited, we do not think Mrs. Lee can maintain her claim to the land in controversy. Notwithstanding the passage of the married woman's law of 1866,¹ the wife still owes to the husband the

¹ "All the property of the wife at the time of her marriage, whether real, personal, or choses in action, shall be and remain the separate property of the wife;

performance of those common law duties, and the rendering of those services, which are appropriate to their surroundings and circumstances. If he labors in the field, in the workshop, or elsewhere, for her support, as is his legal duty, she cannot charge him for cooking his meals, making or mending his garments, sweeping the floors of his house, milking the cow, or for other services of a like kind. Their duties are correlative, the performance of hers being no less obligatory than the performance of his. The husband is not legally bound to support his wife in luxurious idleness. If she refuses to perform her obligations, she forfeits all right to demand of him a support. The courts uniformly protect the husband in the assertion of his lawful right to receive the benefit of his wife's services. Indeed, it is only upon the theory that the services of the wife belong absolutely to her husband, that the law allows him to recover damages for torts committed upon her, by reason of which he is deprived of those services. If a husband without means is willing to take upon himself all the burdens; or if, because of the possession of adequate means, he is able to relieve his wife from all forms of drudgery, it is in the first instance sometimes commendable, and in the latter always proper, for him to do so; but the wife cannot demand such an exemption as a matter of strict legal right.

It must be borne in mind that we are not now dealing with the question of the husband's appropriation of money made by his wife as *earnings* from work or labor performed in spheres entirely outside of her household duties and obligations. Such earnings are oftentimes exclusively her own; certainly so, when her husband expressly consents to her engaging in the occupation or business from which they are realized. The present case is altogether of a different order. In reaping the benefits of his wife's services in conducting in person her household affairs, Mr. Lee gained nothing to which he was not, independently of the agreement between them, entitled as a matter of absolute right. This is none the less true, though the services she rendered may have been prompted by affection and a wifely devotion which made her willing to save him the expense of hiring servants, which he would have been willing to incur had she so desired. It follows that his alleged agreement with her did not amount to a contract which, in any legal sense, was based upon a valuable consideration. In cold, hard law — which we are obliged to enforce — it was only a *nudum pactum*. The deed made in pursuance of this agreement rested upon no better foundation than the alleged contract itself, and was therefore purely voluntary. We are thoroughly satisfied that the rights of a judgment creditor cannot be defeated by such a conveyance.

Any other conclusion would tend to a disregard and neglect of those

and all property given to, inherited, or acquired by the wife during coverture, shall vest in and belong to the wife, and shall not be liable for the payment of any debt, default, or contract of the husband." Georgia Code, Edition of 1873, Section 1754. — Ed.

mutual obligations existing between married persons of limited means, the observance of which contributes so largely towards making the honest laboring people of this country the bulwarks of its prosperity.

Judgment affirmed.

NUDING v. URICH.

1895. 169 *Pennsylvania State*, 289.¹

APPEAL from decree of Common Pleas of Lehigh County; setting aside the report of the commissioner upon ^{the} claim for wages out of fund realized by sheriff's sale.

The fund in court is a portion of the proceeds of the sale under a *fiery facias* of said plaintiffs against said defendant of the stock and fixtures owned by defendant in a restaurant in the Lehigh Valley Railroad station building at Allentown, kept by defendant. Annie C. Urich, wife of defendant, by a sufficient notice, regularly given, claimed \$108, alleged to be due her out of said business for wages, for services as a cook. The only question raised before the learned commissioner and in court is the legality of the contract made by said husband and wife for the payment of said wages.

The relevant facts found by the commissioner in the supplemental report and not disputed on exceptions, are: That on Aug. 1, 1893, defendant's manservant at the restaurant left, and he thereupon contracted with his said wife to take said servant's place—he offered to pay her the same wages he had paid to said servant—\$3.00 a week; the wife accepted and did the work of a servant from said date to November 13th of that year, being 15 weeks, for which \$45.00 is claimed. That at the time last aforesaid the man who had been employed as cook at \$7.00 a week also left, and thereupon defendant and his wife made a new contract by which the latter in addition to her former work was to do the cooking for the restaurant and to receive for all such services \$7.00 a week; that she did perform said services until Jan. 24, 1894, for which \$63.00 is claimed; that nothing was paid; that during said period said parties lived together as husband and wife; that said contract was made in good faith; that the wages contracted for were reasonable, and the services rendered were worth the sum claimed.

The court finds to be a further fact what the commissioner states to be the testimony in the first report, that is: "That during these six months (for which compensation is claimed) Mrs. Urich and the children (of said husband and wife) took their meals or most of them at the restaurant, and that they also slept there, removing to the restaurant some of their household goods, and leaving the rest at their

¹ Statement abridged. Arguments omitted. — Ed.

former residence on Lehigh street, that an adult daughter took care of the residence, that the same was at times occupied by the children, and that at other times they remained at the restaurant with their parents."

T. F. Diefenderfer and C. J. Erdman, for appellants.

James B. Deshler, for appellee.

GREEN, J. If Mrs. Urich had been employed by a stranger to perform the same services that she rendered in this case, and for the same wages, and her husband had consented to such employment, the wages to be paid to her, there can be no doubt she would have had a valid legal title to the earnings, and could have sustained her claim against his will although he might subsequently have claimed the wages on the ground that he was the owner of her earnings as her husband. And the reason why she could recover them as against him would be because he had so contracted. In other words his legal right to her earnings in the absence of a contract, would be gone because of the contract made between him and her. Where he agreed that she might have the earnings he certainly forfeited any claim that he might otherwise have to them and thereby surrendered such claim to her. If now he makes a contract directly with his wife, that he, having occasion for extra and unusual service in the course of his business outside of his family relation and needs, will pay his wife for the performance of such service the special wages which otherwise he would be obliged to pay to strangers, it is at least true that, so far as he is concerned, he has surrendered to his wife all claim to be the owner of her services, and therefore, of the compensation which he has agreed to pay her. His consent that she shall receive the compensation for the service, certainly divests the case of the aspect, that he, as the owner of her services, and therefore of her earnings, is entitled to both, against her will, and that element of the contention is removed from the argument. What then is left? Nothing but the proposition that a husband and wife cannot make such a contract. Why not? There is nothing in the act of 1893 which gives her a contracting power that denies or restrains her right to contract with her husband. The second section of the act, P. L. 344, act June 8, 1893, provides that "Hereafter a married woman may, in the same manner and to the same extent as an unmarried person, make any contract in writing or otherwise, which is necessary, appropriate, convenient or advantageous to the exercise or enjoyment of the rights and powers granted by the foregoing section," (sec. 1,) but she may not become accommodation indorser, nor execute a deed without joining her husband. Here is a very large contracting power conferred with only special restrictions which do not embrace the pending question. Within her limitations a married woman may contract to the same extent, and in the same manner as an unmarried person. The first section defines the subjects of her contracting power thus: "that hereafter a married woman shall have the same right and power as an

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unmarried person to acquire, own, possess, control, use, lease, sell or otherwise dispose of any property real, personal or mixed, and either in possession or expectancy," etc.

The word "earnings" does not appear in this act, but as personal services are a species of personal property, it would seem they may be sold, and as earnings represent in common speech the reward for such services, whether in money or chattels, it would seem that they may be "acquired," or "owned," or "possessed," within the fair meaning of the section.


In *Lewis' Estate*, 156 Pa. 337, we held that under the act of 1887 the earnings of a married woman were a species of property and belonged to her and not to her husband, and we all agree that she should have them, where they were the reward of her personal service; her title to them was absolute and she could recover them in an action without joining her husband. We do not think the act of 1893 was intended to restrain the meaning of the act of 1887 but to stand as a substitute for it, and with power and authority, and contracting capacity of married women, at least equal to that which was conferred by the act of 1887.

The word "acquire," in the act of 1893 we think includes everything that would be included in the word "earned" in the act of 1887. A reading of the two acts together indicates clearly that the later one was intended to remove some doubts about the construction of the first, and to place the rights and powers of married women upon a broader, more comprehensive and better defined basis than was accomplished by the act of 1887. The title of the act of 1893 expressly states as one of the objects of the act, the "enlarging her capacity to acquire and dispose of property."

In the present case everything that could be done was done by the husband to enable the wife by her own personal service to acquire for herself alone the reward of that service, and no rights of his, independent of contract, are in the way of her recovery. We agree with the learned court below in the views expressed upon this subject and therefore affirm the decree.

Decree affirmed and appeal dismissed at the cost of the appellants.

WILLIAMS and MITCHELL, JJ. We dissent from this judgment. If it be conceded that the alleged contract is good between the parties it is not good as against the husband's creditors.



BLAECHINSKA v. HOWARD MISSION AND HOME FOR LITTLE WANDERERS.

1892. 130 *New York*, 497.¹

APPEAL from a judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made April 22, 1890, which affirmed a judgment in favor of plaintiff, entered upon a verdict and affirmed an order denying a motion for a new trial.

The plaintiff, a married woman, brought this action to recover from the defendant, a charitable corporation, the damages that she claims to have sustained through its alleged negligence in maintaining a broken cover over a coal-hole in a public sidewalk, which caused her to fall and break her arm. The pleadings presented the usual issue as to the negligence of each party, and the jury rendered a verdict in favor of the plaintiff for five hundred dollars.

Further facts are stated in the opinion.

Horace H. Chittenden, for appellant.

Ezekiel Fixman, for respondent.

VANN, J. Upon the trial of this action the plaintiff testified that at the time she was injured she was living with her husband, a custom tailor, for whom she worked as a seamstress. She was then asked by her counsel: "Were you in receipt of a salary from him?" And under objection answered: "Yes, I received a salary of five and six dollars a week, and I did all the housework and now I can't do it and I must have help, I used to do very good tailoring, but I can't do it now." On her cross-examination she testified that she used the money thus earned by her for the children and the general support of the family. It did not appear that she had any separate estate or business. The court charged the jury that the plaintiff, if she could recover at all, was entitled "to recover for the loss of wages which she has sustained." The exceptions taken by the defendant to these rulings present the only question that we are asked to decide on this appeal. The learned General Term affirmed the judgment of the Circuit on the ground that the money which the plaintiff had been accustomed to receive from her husband for services rendered outside of her household duties, was her own property and that the loss of the salary could be given in evidence as an element of damage the same as if she had been working for a stranger. The only cases cited in support of this conclusion are *Brooks v. Schwerin* (54 N. Y. 343), and *Reynolds v. Robinson* (64 id. 589).

The enabling act of 1860 (L. 1860, ch. 90, as amended by L. 1862, ch. 172), makes separate property out of that which a married woman

¹ Arguments omitted. — Ed.

“acquires by her trade, business, labor or services carried on or performed on her sole and separate account.” As the husband is entitled to the services of his wife at common law, it has uniformly been held that the statute does not apply to labor performed by her for him in his household, even if it is of somewhat extraordinary character. (*Reynolds v. Robinson*, 64 N. Y. 589; *Coleman v. Burr*, 93 id. 17.)

But the husband's right to the services of his wife is not limited to those performed for him in his house, for when she works for him out of doors upon his farm, she is entitled to no pecuniary compensation, and his written promise to pay her therefor is without consideration. (*Whitaker v. Whitaker*, 52 N. Y. 368, 371.) When she works with her husband for another and their joint earnings are used to support the family, if there is no special contract that she is to receive the avails of her labor, they belong to him and he is entitled to recover their value. (*Birkbeck v. Ackroyd*, 74 N. Y. 356; *S. C.*, 11 Hun, 365; *Beau v. Kiah*, 4 id. 171.)

Until recently the power of a married woman to make general contracts, not relating to labor to be “performed on her sole and separate account,” depended upon the act of 1860, and the possession of a separate estate, or engagement in a separate business, was essential to their validity, although she might become liable through her representations by estoppel. (*Linderman v. Farquharson*, 101 N. Y. 434; *Frecking v. Rolland*, 53 id. 422; *Corn Exchange Ins. Co. v. Babcock*, 47 id. 613; *Bodine v. Killeen*, 53 id. 93.)

In 1884 her powers were amplified so that she may now enter into contracts to the same extent, with like effect and in the same form as if unmarried, whether such contracts relate to her separate estate or not, but this enlargement of her rights does not extend to any contract between herself and her husband. (L. 1884, ch. 381.)

She has further been authorized by statute to convey lands directly to and accept conveyances directly from her husband, without the intervention of a third person. (L. 1887, ch. 537.)

Under the act of 1860, she could contract with her husband in relation to her separate estate, for as to that she stood “at law on the same footing as if unmarried.” (*Noel v. Kinney*, 106 N. Y. 74, 78; *Stanley v. Nat. Union Bank*, 115 id. 122; *Manchester v. Tibbetts*, 121 id. 219; *Suau v. Caffé*, 122 id. 308; *Third National Bank of Buffalo v. Guenther*, 123 id. 568; *Owen v. Cawley*, 36 id. 600; *Bodine v. Killeen*, 53 id. 93; *Frecking v. Rolland*, Id. 422; *Knapp v. Smith*, 27 id. 277; *Seymour v. Fellows*, 77 id. 178.)

The contract in *Hendricks v. Isaacs* (117 N. Y. 411) was doubtless regarded as not relating to the separate estate of the wife, and on this basis it is not in conflict with the authorities cited above.

But while she can thus contract with her husband with reference to her separate property, can she make a binding agreement with him as to her own services, to be rendered outside of her household duties and having no connection with a separate business or estate? In other words,

can she hire out to him, to work in his store or factory, and compel him to pay the price agreed upon for her services? If she can, it follows that the plaintiff was entitled to her earnings under the contract that may be implied from the payment of wages to her by her husband, and her ability to earn having been impaired by the negligence of the defendant, the fact was properly proved before and submitted to the jury. Otherwise, the evidence objected to was improperly received, and it was error to instruct the jury that they might consider it in assessing the damages. As a man cannot make a valid contract to pay his wife for extraordinary services rendered in his household, or for working on his farm, how can he make a valid contract to pay her for helping him make clothes in his business as a custom tailor? What basis is there for any distinction? Does the statute, which so modified the common law as to give to the wife her earnings from her own labor performed on her "sole and separate account," contemplate that services for her husband can be performed on her "sole and separate account," unless they have some relation to a separate estate? Under the rule laid down in *Coleman v. Burr* and *Whitaker v. Whitaker* (*supra*), the words "sole and separate account," as used in the statute, cannot mean simply an election on the part of the wife to work for her own benefit, regardless of whom the work is done for. In those cases her election to work for herself, although manifest, did not take the contract out of the common-law rule. In deciding *Whitaker v. Whitaker*, the court used this significant language: "If a wife can be said to be entitled to higher consideration or compensation because she labors in the field instead of in her household . . . the law makes no distinction. It never has recognized the right to compensation from her husband on account of the peculiar character of her services." It seems to be the policy of the legislature, as indicated by recent enactments, to relieve every married woman of the disability of coverture in contracting with anyone except her husband. As to him, the restriction is continued, except that the formality of conveying real estate through the medium of a third person is no longer required. The object of the legislature was probably to protect the marital relation, as well as to prevent the perpetration of frauds upon creditors. Every experienced observer realizes that an unlimited right on the part of the wife to contract with her husband, would afford an easy cover for fraud and would be a perpetual menace to creditors.

The enabling statutes do not relieve a wife of the duty of rendering services to her husband. While they give her the benefit of what she earns, under her own contracts, by labor performed for anyone except her husband, her common-law duty to him remains and if he promises to pay her for working for him, it is a promise to pay for that which legally belongs to him. The fact that he cannot require her to perform services for him outside of the household does not affect the question, for he could not require it at common law. Such services as she does render him, whether within or without the strict line of her duty, belong

to him. If he pays her for them it is a gift. If he promises to pay her a certain sum for them, it is a promise to make her a gift of that sum. She cannot enforce such a promise by a suit against him. We think the rule is well stated by a recent writer when he says that the enabling acts do not apply to the labor performed by a married woman "for her husband, or bestowed on his business, or in his household, or in his care, or in the care of his family, for in such cases it is her marital duty and he is not liable to pay for the services of his wife." (Kelly's Contracts of Married Women, 153.) These views are not in conflict with *Brooks v. Schwerin* (54 N. Y. 343). The plaintiff in that case, a married woman, lived with her husband, and took charge of the family. Having been injured by the negligence of the defendant she was allowed to show, under objection, on the trial of an action brought to recover damages therefor, that she had worked out and received ten shillings a day. The court refused to charge that she could not recover for her time and services while disabled. It was held by three out of the five commissioners who participated in the decision that the evidence was competent and that the request was too broad and was properly refused for that reason.

The distinction between that case and this is that in the former the wife worked for a third person, while in the latter she worked for her husband. When she worked for a stranger, it was on her sole and separate account, and the enabling act protected her contract. When she worked for her husband, it was on his account and the statute did not apply.

In *Filer v. N. Y. Central Railroad Company* (49 N. Y. 47), a leading case upon the subject, it was held that a wife, not engaged in business or in performing labor on her sole and separate account, when injured by the wrongful act of another, could not recover consequential damages resulting from her inability to labor. The court said: "Her services and earnings belong to her husband and for the loss of such services, caused by the accident, he may have an action. . . . She is authorized to sue for any injury to her person or character, the same as if she were sole. This is for the direct injury and for direct and immediate damages, unless she is, on her own account and for her own benefit, engaged in some business in which she sustains a loss."

While we have considered, we have not cited, many cases that bear more or less directly upon the general subject, but have referred to such as declare, limit and illustrate the law relating to the capacity of a married woman to contract with her husband in relation to her own services. Applying the law, as we gather it from the statute and the manifold decisions, to the facts of this case as now laid before us, we think that the plaintiff is entitled to recover actual damages only and that the consequential damages for the loss of her services, both in the house and in the shop, should be recovered by her husband in a separate action brought in his own name. The damages for the injury to her person belong to her, because the statute has given them to her, but the

damages for the loss of her services belong to him, because the common law gave them to him and the statute has not taken them away.

The judgment should be reversed and a new trial granted with costs to abide the event.

All concur.

*Judgment reversed.*¹

¹ See N. Y. Statute of 1896, ch. 272, Section 21, *ante*, p. 513. Also N. Y. Statute of 1892, ch. 594, Section 1. — ED.

SECTION IV.

Wife's Capacity to Contract.

BATCHELDER v. SARGENT.

1867. 47 *New Hampshire*, 262.

ASSUMPSIT on a promissory note signed by the defendant.

Defence, that the defendant at the time of the making and giving said note was a married woman.

The parties agree upon the following statement of facts :

At the time of the making and giving of said note, the defendant was, and still is, the wife of Samuel Sargent. At that time she was the owner of a farm in Canterbury, on which she and her said husband then, and ever since have resided. Said farm was conveyed to her, several years previously, to her sole and separate use, free from the interference and control of her said husband.

The note in suit was given for the price of certain meat stock at that time bought in the name of the defendant, and by her authority, for use on the farm aforesaid, and which was taken and used accordingly on said farm.

Foster & Sanborn, for plaintiff.

[Argument omitted.]

Minot & Mugridge, for defendant.

The statutes authorizing conveyances to married women include personal as well as real estate. Compiled Statutes, ch. 158, secs. 13 and 15 authorize contracts in respect to such property.

The note in suit cannot be sustained on the ground that the neat stock for which it was given, was purchased by the wife for her own property. *Ames v. Foster*, 42 N. H. 381, is directly in point.

The only ground on which the plaintiff's counsel claims to sustain it is, that the neat stock was purchased by the wife for use on the farm she then owned. But we submit that it cannot be sustained on that ground.

It is not sufficient under the statute referred to, section 15, that the contract be made with collateral reference to the property. It must relate directly to it. *Ames v. Foster*, above cited; *Albin v. Lord*, 39 N. H. 202; *Bailey v. Pearson*, 29 N. H. 87.

In the present case the contract between the parties related only to the neat stock. The future use of the stock, intended by the defendant, formed no part of the contract with the plaintiff, even if then known to him.

The contract did not relate to the farm or to anything which could in any way afterwards legally become or be made a part of it. Neat

stock may be very useful on a farm, but it cannot in law be made a part of it. When purchased and placed on the farm it does not become appurtenant to, or connected with it, but still remains separate and distinct property. It is otherwise with repairs and improvements, which become a part of the property itself.

Any supposed equities of the case do not alter the law. *Shannon v. Canney*, 44 N. H. 592.

BELLOWS. J. The decision of this case must turn upon the question whether the note is to be regarded as a contract made in respect to the farm, for the use of which the stock was bought, within the meaning of the law of 1846, ch. 327, sec. 4: Comp. Stat. ch. 159, sec. 15.

Under this statute it has been settled that the note of a married woman given upon a contract not relating to the property held to her sole use, cannot, in a suit at law, be recovered, *Bailey v. Pearson*, 29 N. H. 79; that a married woman may lease such property, even to her own husband, *Albion v. Lord*, 39 N. H. 196; and that no action can be maintained against a married woman upon a promissory note given for money borrowed to pay the price of land to be conveyed to her for her sole and separate use; *Ames v. Foster*, 42 N. H. 581. This decision is put upon the ground that the power of the wife to bind herself by her contracts under this statute exists only where she at the time holds property to her separate use, and where the contract relates to such property, and therefore that she could not bind herself for recovery in anticipation of the purchase of such separate estate.

The question before us, then, is not touched directly by any previous decision, and it becomes necessary to give a construction to the statutes on this point.

By section 2 of the law of 1846, ch. 327, married women are empowered to take, without the intervention of trustees, any real or personal estate conveyed, devised, or bequeathed to them, to their sole and separate use, and to hold, possess, and enjoy the same accordingly; and by section 4 of that act, it is provided that they shall, in respect to all such property, have the same rights and remedies in their own names, and be liable to be sued upon any contract made or wrong done by them in respect to such property, both at law and equity, in the same manner and with the same effect as if they were unmarried — thus putting them in respect to such property upon the same footing as if sole.

They may, therefore, sell, lease, mortgage, cultivate and improve, or otherwise manage and dispose of such lands, in the same way and manner as if unmarried; and such is the doctrine of *Albin v. Lord*, 39 N. H. 202. It must follow, of course, that they may bind themselves to pay for the means of repairing the buildings, and fences, and making improvements of the estate, and for the necessary labor and expenses in its cultivation; and also, we think, for such tools and other farming implements, and such stock of cattle, horses and other animals, as may be needed for the cultivation of the estate in a profitable and husband-like manner.

That a married woman may herself carry on a farm held to her sole and separate use, can admit of no doubt, and this implies the power to contract for the necessary means of stocking it in a suitable manner; for without it she could not carry it on at all. Such a contract must, therefore, be regarded as made in respect to the property so held. As to *that* she is put by the statute in all respects upon the footing of a *feme sole* and there is nothing in that statute, or in the policy of our legislation, that indicates a purpose to withhold from her the powers which others enjoy in the disposition and management of similar property.

These provisions of our statutes are, after all, but modifications of well established doctrines of equity in respect to the contracts of the wife who holds property to her separate use. At law, it is true, she could not bind herself or her property by a contract made during coverture, except as a trader by the custom of London; or where her husband had abjured the realm, or was civilly dead. In the celebrated case of *Corbet v. Podnitz*, 1 T. R. 5, it was held that a wife having a separate maintenance and living apart from her husband, was liable at law on her contracts as a *feme sole*. This case, however, was repeatedly questioned, and the contrary doctrine at length established in the case of *Marshall v. Rutton*, 8 T. R. 545.

In equity it has been for a long time well settled that a married woman, holding property to her sole and separate use, is so far to be regarded as a *feme sole* in respect to such property, that she may dispose of it as she pleases; and as incident to that power may charge it with her debts contracted during coverture; unless, indeed, there be something in the deed or gift to restrict her. If in contracting the debt the intention to charge her separate estate is manifested, courts of equity will enforce payment out of that estate; and it seems now to be settled that such intention will be inferred where she contracts a debt during her marriage by bond, bill, or note, or other express contract in writing, upon the ground that unless it be so held such contract would be totally inoperative. In respect to implied promises of the wife, and promises not in writing, there has been some conflict in the authorities, many of the more modern cases holding that there is no solid ground for any distinction, and that courts of equity should decree payment of both classes of debts out of her separate estate. Among these cases are *Owens v. Dickinson*, 1 Craig & Phillips 48, 52 and 54; quoted in 2 Story's Eq. Jur. 1397, note 1. *Murray v. Barlee*, 3 Mylne & Keen, 209, where there was an able opinion by the Lord Chancellor Brougham, affirming the opinion of Vice-Chancellor Shadwell in the same case, reported in 4 Simons, 82. The opinion of Lord Brougham is quoted at some length in 2 Story's Eq. Jur. sec. 1400, note 1. To the same effect are *Orley v. Kelheimer*, 26 Ala. 332; *Buck v. Breckinridge*, 16 B. Mon. 482, and *Greenough v. Wigginton*, 2 Greene, Iowa, 435.

The general subject is discussed and the authorities collected in 2 Story's Eq. Jur. secs. 1399, 1401; Clancey on Husband and Wife, ch.

9; 2 Kent's Com. 9th ed. 156, sec. 164, *et seq.*, and notes; *Methodist Episcopal Church v. Juques*, 3 Johns. Ch. 77; modified on error as reported in 17 Johns. 548; *Holme v. Tenant*, 1 Bro. Ch. 14, and notes; 1 Mad. Ch. 473-4.

It will be observed, however, that these debts are a charge only upon the wife's separate estate, and that she is in no case personally bound even in equity. The great change, by our statute, is to enable her to hold such property without the intervention of a trustee, and to make her liable at law personally, as well as her estate, for debts contracted by her in respect to it.

As the general engagements of the wife, all those at least which take the form of bonds, bills or notes, would, by a decree of a court of equity, be satisfied out of her separate estate, debts contracted in respect to such property would of course be included. Among the cases of that kind is *Gardner v. Gardner*, 22 Wend. 526, where a court of equity decreed satisfaction out of the wife's separate estate of a bond given by her to the husband for money borrowed to erect or complete buildings upon that estate; and also *Murray v. Barlee*, 3 Mylne & Keen, 209, before cited, where payment out of her separate estate of a solicitor's bill was decreed. In some of the cases, in discovering the intention of the wife to charge her separate estate, stress has been placed upon the fact that the debt was contracted for the benefit of such estate. *Yule v. Dederer*, 22 N. Y. 450.

From this statement of the doctrines of courts of equity, it is apparent that to hold the wife liable for the price of cattle purchased to stock her farm is no extension of her former liability, except so far as it binds her personally; and that is clearly contemplated by the statute.

The power to hold property to the wife's sole and separate use necessarily implies a power to hold whatever is essential to make that use beneficial; such as farming tools, stock, and the like; and as incident to holding such tools and stock, must be the right to purchase them and pledge her credit for the price. To hold that she could not so pledge her credit would go far to deny her right to hold them, as against her husband.

The conclusion we have reached is also, we think, in accordance with the clearest dictates of justice. The wife has used her credit to stock her farm, and she enjoys the benefit of it; and a decision which should discharge her from the obligation to pay for it, would not only be painfully unjust and productive of much mischief in that direction, but would, we are persuaded, be inconsistent with the policy of our legislation, which is to place the wife in respect to such separate property upon the footing of a *feme sole*.

To decide that she is not liable for property so purchased in any form, and at the same time to enable her to hold it against the seller, would arm the husband and wife with a power for mischief that could not have been contemplated by the framers of this law. There must be, therefore,

Judgment for the plaintiff.

PALLISER v. GURNEY.

1887. *Law Reports, 19 Queen's Bench Division*, 519.¹

MOTION by way of appeal from a decision of the judge of the City of London Court. The action was brought against a married woman, without joining her husband as defendant, for goods sold and delivered to her in 1885. At the trial the sale and delivery of the goods to the defendant were admitted, but the plaintiff offered no evidence to show that the defendant was possessed of any separate property when the goods were ordered and supplied, and the learned Commissioner gave judgment for the defendant, but gave leave to appeal.

Hilbery, for the plaintiff.

P. Gye, for the defendant, was not heard.

LORD ESHER, M. R. This judgment must be affirmed. The defendant was sued for wine ordered by her in her own name, as Mrs. A. Gurney; and she was sued without joining her husband as defendant. The question is, whether the order, which would be a binding contract if she were a feme sole, binds her as a married woman; and this depends on the construction of the Married Women's Property Act, 1882. It is said that this statute makes a married woman personally liable upon contracts entered into by her in her own name; but if that was the intention it is not expressed, though it might easily have been expressed. If there are any words in the statute which express that intention they are to be found in sub-s. 2 of s. 1: "A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a feme sole," &c. The section limits the capacity of the married woman to bind herself by the words "in respect of and to the extent of her separate property." It is clear that she is not given an unlimited capacity to enter into and be bound by any contract. Moreover, this point was considered by Pearson, J., in *In re Shakespear*, *Deakin v. Lakin*, and in giving judgment he said: "In my opinion, according to the true construction of the Act, the contract which is to bind separate property must be entered into at a time when the married woman has existing separate property. If she has such property her contract will bind it." With that statement I entirely agree. As to the argument founded on sub-s. 3, that subsection presupposes the existence of separate property, and the capacity of the married woman to contract which arises therefrom, and provides that, if that capacity exists, then the contract shall bind her separate property unless the contrary be shown.

LOPES, L. J. I am of the same opinion. The disability of a married woman to contract was removed by the Married Women's Property

¹ Argument omitted, also opinion of LINDLEY, L. J. — ED.

5 Wife had no
at time of contract

Held

Act, 1882, but only to this extent—that she may now enter into a binding contract in respect of her separate property. If she has no separate property she still cannot contract. I entirely agree with the decision of Pearson, J., in *In re Shakespear, Deakin v. Lakin*, that the contract which is to bind future separate property must be entered into at a time when the married woman has existing separate property. Sub-s. 3 does not aid the argument for the plaintiff, as it clearly presupposes the existence of separate property. I think, therefore, that to entitle the plaintiff to succeed he must prove the existence of some separate property at the time of entering into the alleged contract. The plaintiff in this case failed in this respect, and the judgment for the defendant was right.

*Appeal dismissed.*¹

MESSER v. SMYTH.

1878. 58 *New Hampshire*, 298.

WRIT of entry, on a mortgage of a farm, made by the defendant to the plaintiff. The defendant bought the farm of the plaintiff. At the time of the purchase the defendant was, and ever since has been, a married woman. When the plaintiff conveyed the farm to her, July 30, 1875, she gave him her note for \$4,250, part of the price, and the mortgage to secure the note. The court reserved the question, whether the action can be maintained.

Hatch, for the plaintiff.

S. C. Eastman, for the defendant.

DOE, C. J. Under Gen. Sts. c. 164, s. 1, the farm became the separate property of the defendant when the title passed to her from the plaintiff. And if her note for part of the price, given when the title passed, was a contract made by her "in respect to" her separate property, it was valid, and this action can be maintained. Gen. Sts., c. 164, s. 13.

In *Bailey v. Pearson*, 29 N. H. 77, the wife, having separate property, signed a note with her son, apparently as his surety. The note did not appear to have been given in respect to her property. In *Shannon v. Canney*, 44 N. H. 592, it did not appear that the wife had any separate property. Her note was given for physician's services. In *Carleton v. Haywood*, 49 N. H. 314, the wife had separate property. The suit was assumpsit, charging her as bailee of the plaintiff's money. Her contract was not in respect to her property. In *Whipple v. Giles*, 55 N. H. 139, it did not appear that the defendant ever had any property. Her contract was her retainerment of an attorney for obtaining a divorce. In *Eaton v. George*, 40 N. H. 258.

¹ See changes made by "Married Women's Property Act, 1893"; 56 & 57 Vict. Ch. 63, Sections 1 and 4. — Ed.

262, 263, 264, S. C., 42 N. H. 375, and *Kennard v. George*, 44 N. H. 440, it was held that the land mortgaged by Mrs. George was not her separate property.

In *Ames v. Foster*, 42 N. H. 381, it was probably understood that the money hired by the defendant was not conveyed to her "to be held by her, without the intervention of a trustee, to her sole and separate use, free from the interference or control of her husband," was not her separate property under the act of 1846, but was property which her husband could lawfully appropriate, and in respect to which she was not empowered by the statute to make contracts. *Eaton v. George*, 40 N. H. 258, 262, 263; *Brown v. Glines*, 42 N. H. 160, 161; *Leach v. Noyes*, 45 N. H. 364; *Hall v. Young*, 37 N. H. 134, 146; *Atherton v. McQuesten*, 46 N. H. 205, 210; *Caswell v. Hill*, 47 N. H. 407, 410; *Sanborn v. Batchelder*, 51 N. H. 426. The point determined in *Ames v. Foster* was, that the hiring of the money by the wife before her purchase of separate property, and for the purpose of buying such property, was not authorized by the act of 1846. The hiring of the money did not relate to separate realty owned by her at the time of the hiring. The statute was not construed to make her ownership of separate property, before the time of her making a contract in respect to it, essential to the validity of the contract. The language of the decision is, "the power of the married woman to bind herself by her contract, under this statute, . . . exists only in cases where she is, at the time of making the same, entitled to hold separate property to her own use, and when the contract relates to that property." This was understood to mean that the separate property, in respect to which her contract is made, must be hers at the time the contract is made. *Batchelder v. Sargent*, 47 N. H. 262, 264. "At the time" is not before the time.

In *Hammond v. Corbett*, 51 N. H. 311, a wife was held liable for firewood bought by her on the credit of her separate property, under the act of 1860; but in that case, and in *Blake v. Hall*, 57 N. H. 373, *Muzzey v. Reardon*, 57 N. H. 378, and *Read v. Hall*, 57 N. H. 482, it seems to have been inadvertently taken for granted, either that the property bought by the wife was not her separate property, or that she could not make a valid contract in respect to her separate property unless it was hers before she made the contract. A contract by which a married woman acquires separate property, is a contract made by her in respect to her separate property. *Stewart v. Jenkins*, 6 Allen, 300; *Estabrook v. Earle*, 97 Mass. 302, 303; *Labaree v. Colby*, 99 Mass. 559, 560; *Gordon v. Dix*, 106 Mass. 305, 306; *Faucett v. Currier*, 109 Mass. 79, 81; *Heburn v. Warner*, 112 Mass. 271, 273; *Glass v. Warwick*, 40 Pa. 140; *Pemberton v. Johnson*, 46 Mo. 342; *Ballin v. Dillaye*, 37 N. Y. 35, 39; *Huyler v. Atwood*, 26 N. J. Eq. 504; S. C., 28 N. J. Eq. 275; *Sykes v. Chadwick*, 18 Wall. 141, 145, 147, 148; 2 Perry on Trusts, s. 686.

The defence of legal incapacity in this case cannot stand on the literal meaning of words, or nice and critical construction. The note for

\$4,250, part of the price of the farm, was a promise made by the defendant upon a good consideration. It was made in respect to the farm: her promise to pay for the farm related as much to the farm as would her promise to pay for neat stock bought for use on the farm. *Batchelder v. Sargent*, 47 N. H. 262. The farm was her separate property. And the question is, not whether the farm was hers before or after the note was given, but whether it was hers at the time the note was given. When the title passed to her by the delivery of the deed, and not till then, there was a consideration for the note. The note was a contract made by her when the deed and note were delivered. The deed and note were mutual and simultaneous parts of a contract that was made at a point of time having chronological position but no duration. The note was a contract made by the defendant either after the farm was hers, or when the farm was hers. It was not made before the farm was hers.

A method of construction less strict, less technical, and more consistent with the liberal intention of the legislature and the emancipating character of the statute, leads to the same conclusion. The act of 1846 (c. 327, ss. 1, 2, 4) provides, that, under an antenuptial contract, a wife may hold her antenuptial property to her sole and separate use, free from the control and interference of her husband; that any devise, conveyance, or bequest of property may be made to any married woman, to be held by her without the intervention of a trustee, to her sole and separate use, free from the interference or control of her husband; and that married women, "in the cases aforesaid," shall be liable to be sued upon any contract by them made "in respect to such property," and upon any contract by them made before marriage, in the same manner and with the same effect as if they were unmarried. The act goes beyond the mere dispensing with a trustee, and turning an equitable estate into a legal one, beyond the chancery doctrine of separate property (*Crane v. Thurston*, 4 N. H. 418, 423; 2 Story Eq., ss. 1378-1396; 1 Bishop Law of Married Women, ss. 790-879; 2 id. ss. 162-173), and beyond the protection of the wife. It makes her liable at law personally, as if unmarried, for debts contracted by her in respect to such property. *Batchelder v. Sargent*, 47 N. H. 262, 266. Certain disabilities of married women are abolished by the termination of the common-law interruption of certain antenuptial powers and liabilities. So far as the question in this case is concerned, there is no distinction between their property acquired before marriage and their property acquired after marriage, and no distinction between their property, their separate property, and property held by them in their own right; and the statute is a continuation of antenuptial rights and obligations, and not a creation of new ones. Gen. St., c. 164, ss. 1, 13. The legislation that put an end to the common-law suspension of their antenuptial right of making contracts in respect to their property, was not designed to leave them under all their common-law disabilities in the purchase of their property. And it cannot be regarded as a self-

evident truth, that, under the General Statutes, the conjugal relation is such a disablement and impoverishment of the wife, and suspension of her legal existence (1 Bl. Com. 442; *Poor v. Poor*, 8. N. H. 307, 314), as enables her, by purchase, to acquire and retain a valid title to property without any liability to pay for it. *M. B. & M. Co. v. Thompson*, 58 N. Y. 80, 84.

We must consider how essential the power of making contracts of purchase of property generally is to the enjoyment of the power of making other contracts in respect to it; how extensively married women were disabled by the common law in making the former as well as the latter; and how explicitly the legislature continued their antenuptial power of making contracts in respect to their property, without expressly excepting contracts of purchase or expressly making any distinction between the purchase of property and other contracts respecting it. A contract of purchase, though not the only mode, is a common mode of acquiring property. Legal capacity to make such contract is, in general, a material and fundamental part of the power of making contracts in respect to property. A purchase of property is an exercise of the power of making contracts in respect to it. Of a theoretical system or series of contracts respecting a piece of property, the purchase of it is the first in natural order: and practically the purchase of it is often the contract without which the power of making other contracts in respect to it would be inoperative and worthless. A person's capacity to make, in respect to his property, any contract except the contract of purchase so often necessary for acquiring it, would be a general and comprehensive power with an extraordinary exception. And to supply such an exception by implication would be a construction not in harmony with the liberating purview of the statute.

Whether a married woman's executory contract to purchase property is authorized by the General Statutes, or any previous statute (*Jones v. Crosthwaite*, 17 Iowa, 393, 402; 2 Perry on Trusts, s. 686), is a question on which we give no opinion. But we think that her capacity to purchase property, so far as it is brought in question in this case, has not been abridged since 1846; that the defendant's note, given for her property at the time the property became hers, being the note by giving which she obtained the property, was a contract by her made "in respect to such property," within the meaning of the act of 1846, and was a contract made by a "married woman holding property in her own right, . . . in respect to such property," within the meaning of Gen. Sts., c. 164, s. 13, and that this action can be maintained.

Case discharged.

ATHOL MACHINE CO. v. FULLER.

1871. 107 *Massachusetts*, 437.¹

MORTON, J. The consideration of the note in suit was a debt due by the defendant's husband to the plaintiffs, for which she was not liable. The fact that a previous note, signed by her and her husband, of which this note was a renewal, had been given, does not affect the case. We must look to the original consideration, to see if this note was a contract in reference to her separate property within the meaning of the statute. Gen. Sts. c. 108, § 3. The facts present a case where she was a mere surety for her husband, without any consideration received by her, or any benefit to her separate estate. Such a promise cannot be held to be a contract in reference to her separate property. If it could, then every promise made by her must be so held, merely because it would otherwise be ineffectual. No case has gone to this length. On the contrary, the case of *Willard v. Eastham*, 15 Gray, 328, proceeds upon the ground that such a promise is wholly void at law. We have no doubt that the note in suit is invalid.

Judgment for the defendant.

MAYO v. HUTCHINSON & THAYER.

1870. 57 *Maine*, 546.²

ASSUMPSIT on a joint and several note, signed by both defendants. Mrs. Thayer was a married woman, and was only a surety on the note. The judge ruled that the action was maintainable against both defendants.

N. H. Hubbard, for plaintiffs.

C. H. Pierce, for defendants.

APPLETON, C. J. The legislature of this State have been gradually enlarging the rights and extending the liabilities of married women. By an act approved Feb. 23, 1866, c. 52, "The contracts of any married woman, made for any lawful purpose, shall be valid and binding, and may be enforced in the same manner as if she were sole," &c. The wisdom or expediency of this act is a matter solely for the legislature. Its language is most general, and there can be no reasonable doubt as to its meaning. A contract of suretyship is a lawful contract, and for a lawful purpose. It is valid and binding on a married woman. The married defendant may have been indiscreet in entering into it, but that is not the fault of the plaintiff. Almost all who sign as surety

¹ Statement omitted. — Ed.² Statement abridged. — Ed.

have occasion to remember the proverb of Solomon: "He that is surety for a stranger shall smart for it, and he that hateth suretyship is sure." But they are nevertheless held liable upon their contracts, otherwise there would be no smarting and the proverb would fail.

Exceptions overruled.

MAJOR v. HOLMES.
BROWN v. FITZGERALD.
BOWKER v. QUILTY.

1878. 124 Massachusetts, 108.

THREE actions of contract upon promissory notes made by husband and wife after the St. of 1874, c. 184,¹ took effect. The consideration of the note in each case was a debt of the husband to the payee, and not money advanced or expended on the separate property of the wife. The first action was brought against the wife alone after the death of the husband. The second and third actions were brought against both husband and wife.

Each case was submitted upon the facts above stated to the Superior Court, which gave judgment for the plaintiff; and the defendants appealed.

The first and second cases were submitted on briefs by *L. Marrett*, for the plaintiffs, and *W. F. Gile & J. S. Gile*, for the defendant in the first case and *E. G. Walker*, for the defendants in the second case. The third case was argued by *P. H. Cooney*, for the plaintiff, and *N. C. Berry*, for the defendants.

GRAY, C. J. Before the St. of 1874, c. 184, the female defendant would not have been liable in either of these cases, because contracts could only be made by a married woman in reference to her separate property, business or earnings. Gen. Sts. c. 108, § 3. *Williams v. Hayward*, 117 Mass. 532; *Nourse v. Henshaw*, 123 Mass. 96.

But this statute has removed that restriction, and in the broadest terms enables a married woman to "make contracts, oral and written, sealed and unsealed, in the same manner as if she were sole," and does not require that the consideration of her contracts should inure to her own benefit. The provision that nothing in this act shall authorize her "to convey property to, or make contracts with, her husband," is evidently not intended to impose any new restriction on

¹ By § 1 of that act, "a married woman may convey her shares in corporations, and lease and convey her real property, and make contracts oral and written, sealed and unsealed, in the same manner as if she were sole;" but "nothing in this act shall authorize a married woman to convey property to, or make contracts with, her husband." By § 3, "a married woman may sue and be sued in the same manner and to the same extent as if she were sole, but nothing herein contained shall authorize suits between husband and wife."

her capacity, but merely to affirm the rule of the common law, so far as her husband is the other party to her grant or contract; and does not prevent both of them from binding themselves by a joint promise to a third person, within the authority conferred by the statute. *Parker v. Kane*, 4 Allen, 346.

The female defendant in each of the cases before us is therefore liable to the plaintiff upon her contract with him, although, by reason of her incapacity to contract with or to sue her husband, no contract of indemnity could be made or implied as between them, as there might be in the case of two promisors capable of contracting with and suing each other. A contract of indemnity between principal and surety is no part of, and nowise affects their contract with the creditor. *Penniman v. Vinton*, 4 Mass. 276; *Carpenter v. King*, 9 Met. 511.

Judgments affirmed.

VEAL v. HURT.

1879. 63 Georgia, 728.

HUSBAND and wife. Principal and surety. Contracts. Before Judge CLARK. City Court of Atlanta. December Term, 1878.

To the report contained in the opinion it is only necessary to add that after verdict for defendant, plaintiff moved for a new trial on the following, among other grounds:

(1.) Because the court erred in charging the jury as follows: "If you believe from the evidence that defendant's husband had previously contracted for or contemplated the purchase of a photograph car on his own account for the sum of \$300.00, and the plaintiff had notice of this, and after such a notice let defendant have said sum of money for the purpose of paying for said car, and took from defendant's husband his wife's note and mortgage therefor, upon that state of facts the plaintiff is not entitled to a verdict in his favor."

(2.) Because the court erred in the following charge to the jury: "Plaintiff's counsel maintain that although the contract of purchase may have been made by the husband, yet when the money borrowed by the wife paid for it, it became her separate property, and therefore, in effect, the money was borrowed by her to purchase property for herself. Upon this point, I charge you that to have this position avail the plaintiff, you must be satisfied from the evidence that the wife knew when she gave her note and mortgage that the money was borrowed on, that the proceeds were to be used in the purchase of a photograph car for herself, and that the title, on the payment of the money, would pass to her and become a part of her separate estate. If you believe from the evidence that the husband made the contract of purchase and the plaintiff had the notice, as I have already told you, then that casts the onus upon the plaintiff to prove to your satisfaction that the title to

the car when purchased went to the wife, and that this was her understanding when she signed the note and mortgage. If such has been proven to your satisfaction from the evidence, then the plaintiff would be entitled to recover, otherwise not."

The motion was overruled, and plaintiff excepted.

Candler & Thomson, for plaintiff in error.

Jackson & Lumpkin, for defendant.

JACKSON, J. The facts make the following case: The husband tried to borrow money from the plaintiff to pay for a car to take photographic pictures, which he had contracted for and for which he was to pay \$300.00, the amount he desired to borrow. He was refused. He then proposed to bring the lender a note for that sum signed by the wife as borrower, and secured by a power of attorney from the wife to the lender to sell her real estate in Atlanta, and pay the note if not paid. The note was to bear interest at 33 per cent. per annum. This was agreed, and the contract was consummated. One hundred and twenty-five dollars was paid and credited on the note, and suit was brought for the balance. It was defended by the wife on the ground that it was the assumption of the debt of her husband, and a contract of suretyship to bind her separate estate to pay his debt.

1. If the husband owed a debt which he was bound to pay, then the money was loaned to enable her to assume his debt, if the lender had knowledge thereof. Did he owe a debt? He had contracted for the car and owed \$300.00 therefor. Therefore he owed for a car and was bound to pay therefor when it was delivered. Did the lender know it? He knew all about it. The car was not for the wife. Nothing was said about the title thereto being put in her, but the money was loaned to enable the husband to pay for it *for his own venture*. In other words, it was loaned virtually that the wife might assume the debt of her husband which he owed for this car he had contracted for, and therefore it is a contract absolutely void under section 1783 of our Code, which declares that she cannot bind her separate estate "by any assumption of the debts of her husband." The wife was never present with the lender. No contract of any sort was made with her in person by him; the husband managed the whole affair, and induced her to go into the arrangement by assuring her that she would never have to pay a cent, for he would make enough to settle it all.

2. The contract, too, bound the separate estate of the wife as security for the debt. She gave the lender a power of attorney to sell her town property and pay the debt therewith, with obligation to turn over the balance to her. If the debt was the husband's, if the car was his, if it was for his venture, and not her property or for her use, then there was a naked effort to bind her separate estate as security to get the money for her husband in order to pay his debt. The same section of our Code also declares that "she cannot bind her separate estate by *any* contract of suretyship," and that "any sale of her separate estate made to a creditor of her husband in extinguishment of his debts,

shall be absolutely void." While this was not exactly a sale to a creditor of her husband, yet it was a power to a lender of money to the wife for the husband, to sell her separate estate in order to pay for a venture of his, and is equally repugnant to the spirit and reason of the statute.

It seems to us that the contract is obnoxious to the provisions of the statute in both views of it, as an assumption debt of the husband, and as an attempt to bind her separate property to pay it.

It matters not, therefore, what may have been the irregularities of the trial; as the verdict is right on the facts, and could not in law be otherwise, the judgment is affirmed.

See 59 Ga. 254-380; 61 ib. 662; *Sutton v. Akin*, not yet reported.

Judgment affirmed.

PARSONS v. McLANE.

WEAVER v. McLANE.

1887. 64 *New Hampshire*, 478.

ASSUMPSIT, for medical attendance on the defendant's husband. Facts found by the court. December 14, 1882, the plaintiffs, practising physicians, were called by the defendant to visit her husband. He had no property, his recovery was regarded as improbable, and the plaintiffs were reluctant to attend him. The defendant urged them to do so, saying that her husband's life was insured for her benefit, and that she would employ and pay them. At that time the defendant had no estate in her own right. Relying upon the defendant's promise, the plaintiffs attended her husband professionally until his death. The defendant has received the insurance on her husband's life.

B. F. Clark and R. M. Wallace, for the plaintiffs.

G. E. Cochrane, for the defendant.

CARPENTER, J. "Every married woman shall have the same rights and remedies, and shall be subject to the same liabilities in relation to property held by her in her own right, as if she were unmarried, and may make contracts, and sue and be sued, in all matters in law and equity, and upon any contract by her made, or for any wrong by her done before marriage, as if she were unmarried; provided, however, that the authority hereby given to make contracts shall not affect the laws heretofore in force as to contracts between husband and wife; and provided, also, that no contract or conveyance by a married woman, of property held by her in her own right, as surety or guarantor for the husband, nor any undertaking by her for him or in his behalf, shall be binding on her." Gen. Laws, c. 183, s. 12. Since the passage of the act of July 18, 1876 (Laws of 1876, c. 32), embodied in the foregoing

section, it has not been necessary to the validity of a married woman's contract that it should be connected with or relate to property held by her in her own right. The only limitations upon her capacity to make contracts are those contained in the two provisos. *Harris v. Webster*, 58 N. H. 481, 483; *Luther v. Cote*, 61 N. H. 129.

The purpose of the second proviso of the act of 1876 was to deprive the wife of her common-law capacity to mortgage her estate to secure the payment of her husband's debts (*Babbitt v. Morrison*, 58 N. H. 419, *Thompson v. Ela*, 58 N. H. 490, *Bank v. Berry*, 63 N. H. 109), and to re-enact her common-law incapacity to assume his contract obligations, or to become a surety or guarantor for their performance. *Stokell v. Kimball*, 59 N. H. 13; *Buss v. Woodward*, 60 N. H. 58; *Bank v. Buzzell*, 60 N. H. 189. The expression "nor any undertaking by her for him or in his behalf" must be construed with the preceding language by which it is limited and explained. It was not intended to preclude the wife from pledging her credit to save her husband's life, nor to prohibit a wife who has property from providing or contracting for the support of a husband who has none, or from contracting for necessities for herself and her family, although the duty of supplying them rests by law upon the husband. *Ferren v. Moore*, 59 N. H. 106. A contract which operates for the husband's advantage is not necessarily an undertaking for him or in his behalf, within the meaning of the statute.

It does not appear that the plaintiffs were called at the husband's request, or that he assumed any obligation to them. So far as the case shows, it was an independent contract on the part of the defendant, made on her own account, without her husband's solicitation or knowledge. It is not invalid for the mere reason that it was intended for and resulted in benefit to him. *Judgment for the plaintiffs.*

CLARK, J., did not sit: the others concurred.

WELLS v. FOSTER.

1888. 64 *New Hampshire*, 585.¹

WRIT of entry, on a mortgage executed by Charles Foster and his wife Louisa, March 29, 1883, to Herbert B. Moulton, to secure the payment of their note of that date for \$800, payable to Moulton or order on demand with interest. Facts found by the court. After the note was overdue, it was endorsed, and the mortgage assigned by Moulton to the plaintiffs for value. Charles was defaulted; the administrator defends under the general issue, with a brief statement.

Louisa died pending the suit, leaving a will by which she gave to her husband one dollar, to her two sons one dollar each, and the resi-

¹ Argument omitted. — Ed.

due of her estate to her daughter, Jessie M. Titus. From May 6, 1882, until her death she owned the farm in question in her own right. Charles carried it on, and managed it on his own account. In March, 1883, he was, and for several years had been, involved in debt and insolvent. Before March 29, Louisa agreed with Charles to mortgage her farm for money to pay his debts. He applied to Moulton for the money, stating that he and his wife wanted to borrow \$800, and that she would mortgage the farm as security. Moulton told him that he would let his wife have that sum upon her note and mortgage of the farm. March 29, Louisa and Charles executed the note and mortgage, and delivered them to Moulton, who in the presence of Louisa handed the \$800 to Charles. Moulton had no negotiation or talk with Louisa. He understood that Charles was her agent in the business. He was not informed, and did not know, for what purpose the money was wanted. He knew that Charles was financially irresponsible, and made the loan on the credit of Louisa and the security of the mortgage exclusively. With Louisa's knowledge and consent, Charles appropriated the \$800 to the payment of his debts.

H. M. Morse and W. S. Ladd, for the plaintiffs.

Aldrich & Remick and J. W. Remick, for the defendants.

DOE, C. J. As we understand the case, it is found as a fact that Mrs. Foster did not sign the note as surety for her husband, and that the money which she promised to repay was hired not by him as a principal, but by her. Her alterable intention to give him the money did not suspend her legal capacity to hire it. The case is determined by *Parsons v. McLane*, 64 N. H. 478.

CARPENTER, J., did not sit: the others concurred.

Judgment for the plaintiffs.

SECTION V.

Wife's Capacity to Convey or Devise.

COLE v. VAN RIPER.

1867. 44 Illinois, 58.¹

LAWRENCE, J. This was an action of ejectment, and one of the questions presented by the record is, whether under the law of 1861, known as the married woman's act, a married woman can convey real estate, acquired since that time, without the joinder of her husband.

That act provides "that all the property, both real and personal, belonging to any married woman, as her sole and separate property, or which any woman hereafter married owns at the time of her marriage, or which any married woman, during coverture, acquires in good faith from any person other than her husband, by descent, devise or otherwise, together with all the rents, issues, increase and profits thereof, shall, notwithstanding her marriage, be and remain during coverture, her sole and separate property under her sole control, and be held, owned, possessed and enjoyed by her the same as though she was sole and unmarried; and shall not be subject to the disposal, control or interference of her husband, and shall be exempt from execution or attachment for the debts of her husband."

The legislature has here used very sweeping language, but it must be interpreted with reference to the evil intended to be cured, and in such manner as to be made to harmonize with other statutes which are left unrepealed, so far as such harmony can be secured without disregarding the legislative intent. It is a familiar maxim, that repeal by implication is never favored.

That this statute cannot be enforced according to its literal terms without impairing, to a very large extent, the strength of the marriage tie, will be evident on a moment's reflection. By the terms of the act, the property of a married woman is to be "under her sole control, and to be held, owned, possessed and enjoyed by her the same as though she was sole and unmarried." If this language is to receive a literal interpretation, a married woman, living with her husband and children in a house owned by her, would have the right to forbid her husband to enter upon the premises, and he would be a trespasser in case he should enter against her will, and would be liable to her in damages. Such would be her rights as a *feme sole*. The wife could thus divorce her husband *a mensa et thoro*, without the aid of a court of chancery. Or, again, suppose in a house thus owned and occupied, the furniture is also the wife's property. Can she forbid the husband

¹ Statement and argument omitted. — Ed.

the use of such portion as she may choose, allow him to occupy only a particular chair, and to take from the shelves of the library a book only upon her permission? This would be all very absurd, and we know the legislature had no idea of enacting a law to be thus interpreted. It is simply impossible that a woman married should be able to control and enjoy her property as if she were sole, without leaving her at liberty, practically, to annul the marriage tie at pleasure; and the same is true of the property of the husband, so far as it is directly connected with the nurture and maintenance of his household. The statute cannot receive a literal interpretation.

The object of the legislature was, not to loosen the bonds of matrimony, or create an element of constant strife between husband and wife, but to protect the latter against the misfortunes, imprudence, or possible vice of the former, by enabling her to withhold her property from being levied on and sold for the payment of his debts, or squandered by him against her wishes. Before the passage of this law, the husband became the owner, by virtue of the marriage, of the personal property held by the wife at the date of the marriage, or which came to her after that time, and was reduced by the husband to possession, and he was also seized of an estate, during coverture, in lands held by the wife in fee. This estate was, in the eye of the law, a freehold, as it would continue during their joint lives, and might last during his life, and was liable to be sold on execution against the husband. 2 Kent, 180. The personal property reduced to possession, and this estate in the wife's land, were at the disposal of the husband, and liable to be sold at his pleasure, for his own use, or to be levied upon and sold by his creditors. These were the evils which the law was designed to cure, and has cured. Although we held in *Rose v. Sanderson*, 38 Ill. 247, that where the husband's estate in the wife's lands had vested before the passage of this law, it was not divested by the act, and might be sold by his creditors, yet where the marriage has occurred, or the land has been acquired by the wife, since that time, it would doubtless be held, that this species of estate, known as an estate during coverture, has been substantially abolished, because its existence is wholly irreconcilable with both the language and the objects of this law.

But besides this estate which the husband acquired, by virtue of the marriage, in the lands of his wife, he also, if there was issue of the marriage born alive, became tenant by the curtesy of all lands of the wife which such issue might by possibility inherit, and this estate, unlike the other, terminated only with his own life. The law termed this estate initiate on the birth of issue, and consummate only on the death of the wife, but the initiate estate could be seized and sold on execution against the husband. Up to the period of the wife's death, it was substantially the same thing as the estate during coverture above mentioned. Now, although this estate is greatly modified by the act of 1861, it is not totally destroyed. During the life of the

wife, the husband can exercise no control over his wife's lands as tenant by the curtesy, nor has he an interest in them subject to execution. We refer, of course, to lands where no interest had vested before the passage of the law. This estate, then, would be totally abolished, like the estate during coverture, were it not that tenancy by the curtesy continued after the wife's death, and, indeed, at that period became most material to the husband, since, up to that time, he had the enjoyment of his wife's realty by virtue of the other species of estate. While, then, the one estate is annihilated by a necessary implication, the utmost that can be said in regard to the other is, that it is materially modified. This estate is as old as the common law. It has always been recognized as existing in this State. It is not expressly abolished by the act of 1861, and, so far from being abolished by implication, it may be recognized as taking effect on the death of the wife, without conflicting in the slightest degree with the letter, spirit, or object of that law. On the contrary, the law itself provides, that it is "during coverture" that the property of the wife is clothed with these new qualities, thus leaving the existing law unchanged, as to the disposition of the wife's property at her death. Moreover, it is hardly to be supposed, that the legislature would totally abolish this estate, without remodeling that of dower, or that they would work so important a change in our law of realty merely by implication. But, in fact, there is not even an implication that affects this estate after the death of the wife.

We have said thus much in regard to this estate, as a foundation for our opinion that this act does not enable the wife to convey her lands without the consent of her husband, manifested by joining in the deed. At common law the wife could only convey by fine or a common recovery, and a fine levied without the husband's consent was not binding upon him unless he was a party. 2 Kent's Com. 150. A conveyance in which the husband unites has been substituted in this country, and is the mode pointed out by the 17th section of the statute of conveyances. The estate of the husband in the wife's lands could not, therefore, be destroyed or impaired by the sole act of the wife. If this section of our conveyance act is repealed by the act of 1861, it is repealed by implication, which, as already remarked, the law does not favor. But where is the implication? Not certainly in the language of the act, which gives the wife the right to hold, own, possess, and enjoy her property, for the terms give only the *jus tenendi* and not the *jus disponendi*. The power to own and enjoy is entirely different from the power to dispose of, and the latter is not necessary to the exercise of the former. Neither is the power of disposing implied in that phrase of the law directing that her property shall be under her sole control, because that term, although indefinite, must be construed in connection with the terms "own, hold, possess, and enjoy." In order that she may hold and enjoy she must necessarily control. But the control of the use and enjoyment does not imply the power to sell.

Strictly speaking, the land, when conveyed, would pass away from her control and enjoyment.

But the chief reliance seems to be placed on the provision, that she is to have the power of controlling and enjoying as if she were sole and unmarried, and hence it is contended she can convey as if she were sole, and her deed would have the same effect as the deed of a *feme sole*. If she can convey at all, because of the language in the act referring to the condition of a *feme sole*, her deed would undoubtedly have this effect, and would thus destroy the husband's estate by curtesy, and prevent him from resuming possession of the lands conveyed, after her death. We have already given the reasons why this act does not annihilate the estate of a tenant by the curtesy, or place it in the power of the wife to destroy it. If we are right in that conclusion, it necessarily follows, that it was not the intention of the legislature, when they gave her the power to enjoy as a *feme sole*, to give also the right to convey as a *feme sole*, and thereby destroy the husband's estate.

There is another reason for not holding that this act enables the wife to convey by her own deed. Before the passage of the law, acts similar in their general character had been passed in several of our sister States. The law of New York expressly gave the wife the power of conveyance. The laws of Pennsylvania and New Jersey did not, but employed terms of the same general character as our own. Our legislature chose to shape our law after the latter models. It is but a just inference, that the omission of any words, in our act, expressly giving the power to convey, was the result of design and not of accident.

The Supreme Courts of Pennsylvania and New Jersey have given to the acts of these States the same construction adopted in this opinion. *Walker v. Reamy*, 36 Pa. St. 410; *Naylor v. Field*, 5 Dutcher, 287.

We should add, in conclusion, that we have not considered the question of the power of the wife to dispose of her personal property. That may depend upon different considerations. The power to sell has sometimes been considered a necessary incident to the ownership of personal property. But a majority of the court are of opinion that the act of 1861 does not authorize a married woman to convey her realty in any other manner than that pointed out by the statute of conveyances. In holding this, however, we do not question the rule laid down in *Emerson v. Clayton*, 32 Ill. 493, as to the right of a married woman to bring a suit in her own name. That right is a necessary incident to the law.

As the decision of this question disposes of this case, it is unnecessary to consider the other questions raised.

BREESE, J., dissents.

Judgment reversed.

NAYLOR v. FIELD.

1861. 29 *New Jersey Law* (5 *Dutcher*), 287.

CASE certified from the Monmouth Circuit.

The point certified is whether the will of a married woman, made after the passage of the act of 1852, devising lands conveyed to her after the passage of that act and during her coverture, is valid to pass the title to the land to her devisee. Rachel Willet, the devisor, was married long prior to the passage of the act of 1852.

J. D. Bedle, for plaintiffs.

J. Parker, for defendants.

[WHELPLEY, C. J., delivered an opinion, from which the above statement of the point is taken. He held the devise invalid.]

VREDENBURGH, J. The only question in this cause is, whether a will of a woman married before the passage of the act for the better securing the property of married women, passed March 25th, 1852, of lands conveyed to her since the passage of that act passes the legal title.

The act of 1846 (Nix. Dig. 874, § 3,) provides that wills or testaments, made or to be made of any lands by any woman *covert*, shall not be held or taken to be good or effectual in law.

If this section, therefore, be not repealed, either expressly or by implication, this will cannot be effectual in law.

But it is claimed by the defendants that the act first above recited, of the 25th of March, 1852, does repeal it, not expressly, but by necessary implication.

The third section of the act of 1852, which governs this case, provides that it shall be lawful for any married female to receive by gift or grant, and hold to her sole and separate use as if she were a single female, real and personal property, and the rents, issues, and profits thereof, and the same shall not be subject to the disposal of her husband, nor be liable for his debts.

In order to construe a statute so as to repeal a former statute by implication, the implication must be a necessary one.

It is contended here that the *jus disponendi* is a necessary incident of all property, and as this statute takes away all property from the husband, and vests whatever rights he had under the old law in the wife, and gives her an absolute present fee, that by necessary implication it repeals the act of 1846.

But, in the first place, it is not universally true that the *jus disponendi* is an incident of property. It is and always has been suspended in the cases of infants and lunatics, and until the passage of the act in question, as to *feme coverts*.

In the next place, it is apparent that the clause in question was not intended to remove any disability the wife was under to dispose of her property; it was only intended to give her a property in the land, which

would otherwise, by the conveyance to her, *ipso facto* vest in the husband, to wit, the estate, during their joint lives.

It was this joint estate, and no other, the act was intended to affect. The act intended that, as before its passage, a married woman could not receive by grant any land as a married woman without its vesting *ipso facto* during their joint lives in the husband, she should, by the act, be enabled to receive it otherwise, that is, she should be able to receive it not as a married woman, but as a *feme sole*, so that it should not *ipso facto*, by the reception, vest in the husband; but the act had to go further, for if it had stopped with the word "receive," although she might receive it as a *feme sole*, yet the very next instant after she received it, it would vest in the husband by virtue of the marriage relation, as if she had got it before marriage. So it was necessary for the act to go further, and it adds accordingly, that it shall not only be lawful for her to receive it as a *feme sole*, but that she shall hold it as a *feme sole*. This was necessary, because from the instant that she ceased to hold it as a *feme sole* she would hold it as a married woman, and a joint estate thus vest in the husband, and subject it to his control and debts. To prevent this was the sole object of the words "receive and hold." But this power to receive and hold under the act is limited to the continuance of the marriage in its express terms. It is only a married woman can so hold. As soon as the marriage relation ceases the act has no object on which it can operate. The property, upon the death of either husband or wife, is instantly as if the act had never been passed.

It is contended that the word "hold," in the act, meant that the wife should hold as in a pure fee simple; but it is apparent that the word "hold" was not intended to be used by the act in that sense, but simply to prevent the estate, at each instant during the marriage, becoming the joint estate of husband and wife. It was absolutely necessary to use that word to prevent the title at each instant lapsing into a joint estate.

It is impossible to construe the word as the defendants would without altering the relationship of husband and wife; much more, then, it is apparent the legislature intended the great and only object of the act was to prevent the joint estate and to free the land from the debts and control of the husband during coverture. But it did not intend to affect the marriage relation, strictly so speaking, at all.

The words receive and hold were only intended to indicate the character in which she held the property in its relation to the debts and control of the husband, but not to disturb the marriage relation in any other respects. She still is wife, and he husband. He is, as yet, entitled to live in her house, to eat at her table, and to sleep in her bed. She cannot, therefore, hold literally as a *feme sole*. She cannot bring an action of ejectment, and thus pass against him a decree of divorce *a mensa et thoro*. All the relations, privileges, and disabilities of husband and wife still exist, save only that the mere fact of

marriage does not vest in him a joint estate. This court decided in *Adams v. Ross*, 4 Dutcher, 160, that notwithstanding this act the husband, at the death of the wife, was entitled to his curtesy.

It is true that in the State of New York it has been decided (28 Barb.) that the husband has no curtesy; but in that state the statute, in express terms, gives the wife the *jus disponendi*.

What necessary implication is there that the act of 1852 repeals *quo ad hoc* the act of 1846? Before the act of 1852, the wife owned the fee simple subject only to the curtesy and the joint estate, yet she was expressly deprived of the *jus disponendi*. The act of 1852 only gives her the additional estate during the marriage. Why would she have the *jus disponendi* any the more because the act disenables the estate to pass to the husband?

Acts of similar import have been passed in several of the other states; but I have been unable to find a single case where it has been construed to carry with it the *jus disponendi* without an express provision to that effect. Our act is a copy of that of the State of New York, so far as it goes, but refuses to follow it, so far as regards the power to convey or devise.

I am satisfied that the whole object and intent of the words "receive and hold" was merely to prevent the estate during coverture from lapsing into a joint estate, and not otherwise to affect the marriage relation or give any power to convey or devise, and that the mere disenabling the estate from passing through the wife to the husband and wife during marriage was not intended to give, and did not necessarily give her the *jus disponendi*.

OGDEN, J., concurred.

BEAL v. WARREN.

1854. 2 Gray (*Massachusetts*), 447.¹

ACTION of tort for breaking and entering the plaintiff's close, and cutting and carrying away ten cords of wood.

The former owner of the premises conveyed them to Mrs. Ruth F. Quindley, a married woman, to be held by her to her sole and separate use, free from the interference or control of her husband. Mrs. Quindley subsequently executed a deed (in which her husband did not join) conveying the premises to the plaintiff, who took immediate possession. The wood was cut by the defendants at a later date.

The judge instructed the jury that, although the deed to the plaintiff would not "convey to him the estate of Mrs. Quindley in the premises, yet that she, being in occupation of them, and having the management

¹ Statement abridged. Argument omitted. Only so much of the case is given as relates to a single point.—Ed.

of them, so far as the evidence showed, with the assent of her husband, or at least without objection or interference on his part, in connection with the possession taken by the plaintiff under it, there was sufficient evidence of such a tenancy by the plaintiff as would enable him to maintain this action against mere wrongdoers without any title, such as the defendants were." To these instructions the defendants excepted.

"The presiding judge, upon the authority of *Beach v. Manchester*, 2 Cush. 72, ruled that the plaintiff's deed from Mrs. Quindley, and his possession under it, did not convey to the plaintiff a title sufficient to entitle him to recover the value of the wood cut and carried away by the defendants, but only damages for the injury to his possession." The jury returned a verdict for nominal damages. And the plaintiff excepted to this last ruling.

J. J. Clarke, for defendants.

N. C. Berry, for plaintiff.

THOMAS, J. [After deciding another point.] The second question raised by these exceptions is, what effect, if any, is to be given to the deed of Mrs. Quindley to the plaintiff. This question depends upon the construction to be given to the statute of 1845, c. 208, giving authority to married women to hold property to their separate use, without the intervention of trustees.

The deed of Simeon Warren to Mrs. Quindley was made under this statute. It was a grant of an estate to her and her heirs, in fee simple, "to be held by her, without the intervention of a trustee, to her sole and separate use, free from the interference or control of her husband, agreeably to the statute in such cases provided." Mrs. Quindley made to the plaintiff a deed of the land, her husband then living. The question is what title or interest, if any, the plaintiff took under this deed. The effect of the deed depends upon the construction of the statute of 1845, c. 208. As the separate deed of a married woman, it would be at common law, or under the previous statutes of the Commonwealth, simply void.

The fifth section of this statute provides that whenever any property shall be secured to any married woman, or conveyed, devised or bequeathed to her, pursuant to the provisions of the statute, "such woman shall, in respect to all such property, have the same rights and powers, and be entitled to the same remedies in her own name, at law and in equity, and be liable to be sued at law and in equity, upon any contract by her made or any wrong by her done in respect to such property, and also upon any contract by her made or wrong by her done before her marriage, in the same manner and with the same effect as if she were unmarried; and all such property may be attached in any such suit, and may be taken on execution, as if she held the same, being unmarried."

Section 7 provides that if any married woman, holding property to her separate use by virtue of this act, shall die intestate, all her right and interest in any personal property thus held shall vest in the hus-

band, unless other provision is made in relation thereto by the terms of the contracts or conveyances under which she holds; and that he shall be entitled to his estate by the curtesy in all lands and tenements held by his wife, as if this act had not been passed.

The language of the statute is broad and comprehensive, giving to a married woman, holding property by this tenure, the same rights and powers, and entitling her to the same remedies at law and in equity, in relation to such property, as if she were unmarried, conferring upon her authority to make contracts in relation to it, and making her liable to be sued at law and in equity upon such contracts, and in such suits rendering the property liable to attachment and seizure on execution. Clearly she could dispose of the property indirectly; for she could render herself liable upon contracts to its full value. And she can do it directly, if we give full force and effect to the language conferring upon her "the same rights and powers, in respect to such property, as if she held the same, being unmarried."

In the consideration of this point, our chief embarrassment has arisen from the case of *Beach v. Manchester*, 2 Cush. 72; not from the point decided, but from the view there expressed of the statute.

Upon careful consideration of the view then taken of the statute, a majority of the court think it is not sound; but that the fifth section confers upon a married woman, holding property under the statute, the right and power of conveying such property, by deed, subject only to the limitation, contained in the seventh section, of the rights of the husband as tenant by the curtesy, or other restrictions or limitations contained in the instrument under which she holds. The result is, that the deed of Mrs. Quindley to the plaintiff conveyed to him her entire interest in the estate; that is, the fee simple, subject to the curtesy of the husband. Such being the estate taken under the deed of Mrs. Quindley, he was entitled to recover the value of the wood taken by the defendants.

Plaintiff's exceptions sustained, and new trial ordered in this court.

ENGLER v. ACKER.

1886. 106 *Indiana*, 223.¹

FROM the Porter Circuit Court.

W. E. Pinney, for appellant.

A. D. Bartholomew and E. D. Crumpacker, for appellees.

Howe, J. This was a suit by the appellees against the appellant, Louisa Engler, and her husband, Jacob Engler, to foreclose a mortgage

¹ Only part of the opinion is given. — ED.

on real estate and collect the debt intended and attempted to be secured thereby.

Upon the facts found by the trial court, the questions for decision as to the appellant were, whether or not she had the power, under our statutes, to execute the mortgage in suit upon her separate estate to secure the payment of her husband's notes. The questions were not, as the court seemed to think they were, whether such mortgage was, or was not, supported by a sufficient consideration. In section 5119, R. S. 1881, in force since September 19th, 1881, it is thus provided: "A married woman shall not enter into any contract of suretyship, whether as endorser, guarantor, or in any other manner; and such contract, as to her, shall be void."

Under this section of the statute we have held time and again that a mortgage, executed by a married woman on her separate real estate to secure her husband's debt, is absolutely void. Thus, in *Dodge v. Kinzy*, 101 Ind. 102, after quoting section 5119, *supra*, the court said: "The provisions of this section of the statute are too plain to be misunderstood. They positively forbid a married woman to enter into any contract of suretyship, in any manner, and as positively declare that any such contract, as to her, shall be void." To the same effect, substantially, are each of the following cases: *Allen v. Davis*, 99 Ind. 216; *Allen v. Davis*, 101 Ind. 187; *Brown v. Will*, 103 Ind. 71. The trial court has stated as its first conclusion of law, and we think that the facts found by the court fully support this conclusion, that appellant, Louisa Engler, is free from fraud, actual or constructive, in any of the transactions involved in this controversy. There were no facts found by the trial court, whereby it can be said that appellant was legally or equitably estopped to resist the enforcement of the mortgage in suit against her or her separate real estate. The mortgage was absolutely void, under section 5119, *supra*, and a court of equity will not decree the foreclosure of a void mortgage.

The judgment is reversed, with costs, and the cause is remanded, with instructions to the court to set aside its conclusions of law, and, in lieu thereof, to state other conclusions of law in favor of Louisa Engler, in accordance with this opinion, and to render judgment accordingly.

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KUHN v. OGILVIE.

1896. 178 *Pennsylvania State*, 303.¹

Scire facias on a mortgage, executed in 1894, by Ada J. Ogilvie and her husband, purporting to mortgage the wife's real estate as security for the payment of the husband's debts.

The Court of Common Pleas entered judgment for the plaintiff; and defendant appealed.

R. E. Cresswell, for appellant.

Donald E. Dufton, (*Kuhn*, *Kittell*, and *Evans* with him,) for appellees.

MITCHELL, J. A mortgage being in many respects treated as a mere security, though in form a conveyance, it might well have been held that a mortgage by a married woman to secure her husband's debt, is in substance a contract of suretyship which she was not, at common law, capable of making. But on the other hand, she has, under the law of Pennsylvania, the right of every owner to convey her estate, subject to certain conditions as to mode, etc., and as she could sell or mortgage and give the money immediately to her husband, there was no substantial reason why she should not subject her estate to a merely contingent liability for the same purpose. When the case of *Hoover v. The Samaritan Society*, 4 Whart. 445, came before this court, the latter argument prevailed, and it was held that a married woman could use a power of appointment to execute a mortgage as collateral to her husband's bond for money loaned to him.

This view has been steadfastly adhered to, and it is now the established rule that a married woman may mortgage her estate as security for her husband's debt, including future advances to him, or for the debt of any other person: *Haffey v. Carey*, 73 Pa. 431; *Hagenbuch v. Phillips*, 112 Pa. 284; *Du Bois Deposit Bank v. Kuntz*, 175 Pa. 432.


This being settled, the only question left open in the present case is whether the rule has been changed by the act of June 8, 1893, P. L. 344. It will be observed that the cases last cited were decided after the married woman's act of 1848, and it was held that the capacity of a married woman to mortgage her estate was not affected by that act, the purpose of which was to restrict the husband's power and that of his creditors, not that of the wife herself. The act of 1893 is a further step in the same direction, and instead of contenting itself with restricting the power of the husband, it affirmatively enlarges the power of the wife. The first section provides for her control over her estate, including conveyance and mortgage of realty when her husband joins. The second section authorizes her to "make any contract in writing or otherwise, which is necessary, appropriate, convenient, or advantageous to the exercise or enjoyment of the rights and powers granted

¹ Statement abridged. Arguments omitted. — Ed.

by the foregoing section, but she may not become accommodation indorser, maker, guarantor or surety for another." It is upon this last clause that the argument for the appellant rests. It is clear however that this was a cautionary provision against too liberal a construction of the very large powers conferred by the first part of the section, a saving of the previously existing disability so far as it covered the particular class of contracts specified. The general intent of the act is so plainly in enlargement of her contractual capacity, that nothing less than explicit negative words should be construed as narrowing powers admittedly possessed before the passage of the act.

The case of *Patrick v. Smith*, 165 Pa. 526, arose under the act of 1887, and there is nothing in it in conflict with this view of the act of 1893. A wife indorsed her husband's note, which plaintiffs discounted and passed to her credit, and she immediately drew a check to her husband's order for the whole amount. At maturity the husband paid part of the note and the wife gave her note for the balance which plaintiffs discounted and she again drew her check to her husband's order for the proceeds. On this note she was sued. It was held that her action throughout was for the accommodation of her husband, and that the statute could not be evaded by such a "transparent device" to which the plaintiffs were party. *Real Estate Co. v. Roop*, 132 Pa. 496, also arose under the act of 1887, and the strict construction given there probably had much influence in the passage of the act of 1893, with enlarged grant of contractual capacity in express terms.

Judgment affirmed.



SECTION VI.

Specific Performance of Wife's Agreement to Convey. Rectification of Wife's Deed.

BROWN v. PECHMAN.

1898. *Supreme Court of South Carolina. 53 South Carolina Reporter, 1.*¹

BEFORE GARY, J. Barnwell, November, 1897.

Action for possession of real estate. *Elizabeth A. Brown v. Chas. F. Pechman*. From order refusing permission to amend answer, the defendant appeals.

Robert Aldrich and Patterson & Holman, for appellant.

Bellinger, Townsend, & O'Bannon, contra.

JONES, J. The action in this case is to recover real estate, and this is the second appeal. The plaintiff inherited the land in question prior to 1860, and on June 5th, 1869, joined with her husband, James C. Brown, in a deed of conveyance to their son, Pinckney Brown, in the usual form of conveying a fee simple title, with covenant of warranty, and expressed to be "in consideration of valuable services to us rendered, and also the sum of \$250 to us in hand paid." On this deed was indorsed what purported to be a renunciation of inheritance by plaintiff, dated June 23, 1869. On January 26, 1873, for valuable consideration, Pinckney Brown conveyed the land to Charles Pechman, Sr., under whom defendant claims. James C. Brown, the husband of plaintiff, having died in November, 1896, plaintiff, in January, 1897, brought this action to recover said land. The answer of the defendant was simply a general denial. The question in the first trial was, whether the act of 1795 (5 Stat. 257), prescribing the manner in which a married woman should release her inheritance in real estate, was repealed by art. 14, sec. 8, of the Constitution of 1868. This Court, reversing the judgment of the Circuit Court in favor of the defendant, held that the Constitution of 1868 did not repeal the act of 1795. At a subsequent term of the Circuit Court, defendant moved to amend his answer, so as to set up an equitable defense substantially shown by paragraph eight, as follows: "8. That the defendant admits that the said deed, bearing date June 5, 1869, was invalid, by reason of a defective renunciation of inheritance on the part of a married woman, under the act of A. D. 1795, and could not operate to convey the legal title, vested in the said Elizabeth A. Brown at that time. But the defendant further alleges, that as the said deed to Pinckney Brown (under whom he claims) was founded upon a full and valuable consideration, that the said Elizabeth A. Brown will be required in equity to

¹ Arguments omitted. — ED.

specifically perform her said contract, to convey a good and valid title in fee to the defendant herein; or be held estopped in equity and good conscience from recovering the land mentioned and described in the said complaint, which said land the plaintiff attempted to convey in fee, and only failed therein by reason of a defective renunciation of inheritance." The Circuit Court refused the motion to amend, on the ground that, under the admitted statement of facts, the proposed defense could not avail the defendant.

The present appeal alleges that this was error. The appellant contends, by the second and third exceptions, that where a married woman, after the adoption of the Constitution of 1868, to wit: in 1869, attempted to execute a deed for full value, as in this case, and only failed in her design through a defective renunciation of inheritance, that in an action by such married woman for the recovery of the real estate so attempted to be conveyed, the court of equity will either hold that she is estopped or will construe such defective deed as an agreement to convey, and compel specific performance of the contract. The argument, in brief, is that article 14, section 8, of the Constitution of 1868, which provides that the separate property of a married woman "may be bequeathed, devised or alienated by her the same as if she were unmarried," confers on a married woman the power of alienation, which includes the power to make an executory contract to alienate or convey; and that while the act of 1795 was in force at the time of the attempted alienation, and the release of inheritance was not executed, as required by that act, still equity may aid the defective execution of the power conferred by the Constitution. This argument would be convincing, if the power to alienate conferred by the Constitution could have been exercised *independently* of the act of 1795, in force at the time of the attempted alienation. But, as shown in the decision in the former appeal in the case, 49 S. C. 546, compliance with the act of 1795 was requisite to a valid release of inheritance by a married woman. While the Constitution gave the power to alienate, the act of 1795 provided the manner of its exercise. The exercise of the power could only be evidenced by a strict compliance with the statutory method. Failure to comply with the statute rendered the deed void *ab initio*, for want of power. Equity cannot compel specific performance of a void contract. Nor can equity compel specific performance of an agreement to alienate by a married woman, when the alienation can only be made in the manner prescribed by the act of 1795, for this would be to compel what, by the statute, must be without compulsion. The statute binds the court of equity as well as the court of law. If it were otherwise, the statute may be in effect repealed by changing the jurisdiction from law to equity. While equity may aid the defective execution of powers created by private parties, it cannot aid the defective execution of a statutory power, or a power which can only be exercised as prescribed by statute. *Williams v. Cudd*, 26 S. C. 218.

It follows that the doctrine of estoppel cannot be applied in this case. Estoppel rests on capacity to contract. The power to alienate given to a married woman by the Constitution of 1868 does not necessarily imply power to make an executory contract to convey. Plaintiff's power to alienate could only be exercised in the manner prescribed by the statute of 1795, which was not expressly repealed until 1873, 15 Stat. 324, and not even impliedly repealed until 1870, 14 Stat. 325, when it was enacted that "a married woman shall have power to bequeath, devise or convey her separate property in the same manner and to the same extent as if she were unmarried; . . . and all deeds, mortgages, and legal instruments of whatever kind shall be executed by her in the same manner and have the same legal force and effect as if she were unmarried;" and in section 3 of said act she was given power "to contract and be contracted with in the same manner as if she were unmarried." In 1869, therefore, plaintiff could not contract to alienate independently of the statute of 1795, and she could not contract to dispense with the formalities prescribed by that act. Hence, her deed, void for want of compliance with said statute, could work no estoppel. As stated in 14 A. & E. Enc. Law, 639: "If she could be estopped by her invalid deed, she would be able to convey her property without reference to the statutes relating to conveyances of married women, and the said statutes would be in effect repealed." The only ground upon which the court of equity is asked to act in this case is that the purchase money of the land was paid to plaintiff. But the receipt of the purchase money by a married woman will not work an estoppel when she has not released her inheritance as required by the statute. *McLaurin v. Wilson*, 16 S. C. 410.

It is further excepted that there was error in refusing to permit the answer to be amended as moved, because plaintiff should be compelled to refund the purchase money received by her before she could be allowed to recover the land in question. This point does not seem to have been raised in the answer, and doubtless was not considered by the Circuit Court, and strictly should not be considered by this Court. But its determination must be against appellant's views, for such follows logically from the conclusions already reached. To impress a lien on the land for the money received by plaintiff or her husband, or to make the recovery of her land conditioned on the refunding of money paid to her husband or herself in 1869, would be in effect to defeat the provisions of the statute, which provided the only mode by which her title could be conveyed to another. It would be to construct a lien out of a void act, and sweep away indirectly what could not be taken from her directly. In support of these views, see *Central Land Co. v. Laidley*, 3 L. R. A. 826; s. c., 25 Am. St. Rep. 797; *Scott v. Battle*, 85 N. C. 184; *Martin v. Dwelly*, 6 Wend. 9; 21 Am. Dec. 245; *Gliddon v. Strupler*, 52 Pa. 402; note to *Tiernan v. Poor*, 19 Am. Dec. 230.

The judgment of the Circuit Court is affirmed.

HAMAR v. MEDSKER.

1878. 60 *Indiana*, 413.

FROM the Hamilton Circuit Court.

A. F. Shirts, G. Shirts, and W. R. Fertig, for appellant.

WORDEN, J. This was an action by the appellant, against the appellees, who were the children and heirs at law of Mary J. Medsker, deceased, and against Jacob Medsker, the surviving husband of the deceased.

The complaint alleged, in substance, that, on the 19th day of August, 1871, said Mary J. Medsker, now deceased, was the owner, in her own right, of certain real estate situate in the county of Hamilton, and State of Indiana, being forty acres, more or less, which is fully described by metes and bounds; that on that day the plaintiff purchased the same of her for the sum of one thousand six hundred dollars, in hand paid to said Mary J., and on the same day, in pursuance of his purchase, took possession of the land; that, on the same day, the said Mary J. Medsker, together with her husband, Jacob Medsker, in order to convey to the plaintiff the land so purchased by him, executed a conveyance to him, duly signed, sealed and acknowledged by said Mary J. and her said husband; that, by mistake of the draftsman who wrote the deed, the description of the land therein was defective, in this, that, after the words "commencing eighty rods west," the words "of the south-east corner of the south-east quarter" were omitted, and that in consequence the starting-point, in describing the metes and bounds of said tract of land, was inaccurately stated; that the tract of land herein first described is the identical tract of land intended to be conveyed by said deed at the time of the execution thereof by all the parties thereto, being the same tract that he purchased, paid for and took possession of as before stated; that the plaintiff put his deed upon record, and did not discover the defect in the description until after the death of said Mary J.

Prayer for a reformation of the deed and the correction of the mistake.

Jacob Medsker, the husband of the deceased, made default, and as to him no question arises in the record.

A guardian *ad litem* was appointed for the other defendants, who were the minor heirs of the deceased, and on their behalf he filed a demurrer to the complaint, for want of sufficient facts. The demurrer was sustained and final judgment rendered in favor of the demurring parties. Exception and appeal.

It is within the general jurisdiction of a court of equity to grant relief by reforming written instruments, and correcting mistakes therein; and the relief is afforded perhaps more frequently in cases of

mistake in the description of land intended to be conveyed, than in any other class of cases.

We have no brief for the appellees, and are, therefore, not advised in what particular the complaint was supposed to be defective. We see no objection to the complaint, however, if the alleged mistake can be corrected, and the deed reformed, as against a married woman, or, in case of her death, against her heirs. We infer that the demurrer was sustained on the ground, that, in the opinion of the court below, the mistake could not be corrected as against a married woman, and therefore could not, as against her heirs.

We have the following statutory provision, viz. :

"No lands of any married woman, shall be liable for the debts of her husband; but such lands and the profits therefrom, shall be her separate property, as fully as if she was unmarried: *Provided*, That such wife shall have no power to encumber or convey such lands, except by deed, in which her husband shall join." 1 R. S. 1876, p. 550, sec. 5.

This provision has been so far modified, by another statute, as that a seal is dispensed with in instruments executed by husband and wife, as in other cases. *The American Insurance Co. v. Avery*, *post*, p. 566.

Doubtless the lands of a married woman can be conveyed or encumbered in no other mode than that prescribed by the statute; and her agreements in relation thereto, not executed in the manner prescribed by the statute, are void. *Baxter v. Bodkin*, 25 Ind. 172; *Stevens v. Parish*, 29 Ind. 260; *Shumaker v. Johnson*, 35 Ind. 33; *Behler v. Weyburn*, 59 Ind. 143; *The American Insurance Co. v. Avery*, *supra*; *Glidden v. Strupler*, 52 Pa. State, 400; *Dickinson v. Glenney*, 27 Conn. 104.

Where a married woman has attempted to convey her estate, but the conveyance is defective for want of compliance with the requisites of the statute, a court of equity will not lend its aid.

In such case, the court will not require her to make a conveyance in accordance with the requirements of the statute, as this would not only contravene the policy of the law, but it would be requiring her to make such a contract as she herself has not made.

Nor is there, in such case, any valid contract that can be enforced by way of specific performance, because the *feme covert* is incapable in law of making such contract except in the manner prescribed by the statute. *Dickinson v. Glenney*, *supra*.

But where, as in this case, a married woman has sold her land and received the purchase-money, and has executed a deed intended to convey the same, in conjunction with her husband, in all respects in accordance with the statute, and perfect except in the description of the land sold and intended to be conveyed, we think the mistake in the description may be corrected as against her, and, of course, as against her heirs.

If such mistake could not be corrected, gross wrong and injustice would result. It is scarcely necessary to say that it would be grossly unjust for her to retain the purchase-money and also the land.

By the reformation of the deed and the correction of the mistake, the object and policy of the statute are not contravened or thwarted.

A deed has been executed by the wife, in conjunction with her husband, for the land intended to be conveyed. This satisfies the requirements of the statute, and the title of the purchaser ought not to be defeated by the mistake in the description of the land intended to be thereby conveyed.

The judgment below is reversed, with costs, and the cause remanded, with instructions to the court below to overrule the demurrer to the complaint, and for further proceedings.

ELLIOTT, C. J., IN STYERS v. ROBBINS.

1881. 76 *Indiana*, 547, pp. 548, 549.

. . . The case in hand presents, however, a question of controlling importance which was not presented in the case to which we have referred. It was held by the court below that a mistake in the description in the deed of a married woman can not be corrected. Since the judgment of the trial court was pronounced this court has decided the reverse, and it is, therefore, the rule in this State, that a mistake in the description of property contained in a deed executed by a married woman may be corrected. *Hamar v. Medsker*, 60 Ind. 413; *Carper v. Munger*, 62 Ind. 481; *Wilson v. Stewart*, 63 Ind. 294. We are aware that these cases have been disapproved by courts of respectability, but we have seen no argument urged against them of sufficient force to induce us to depart from the rule of *stare decisis*. We are, upon the contrary, satisfied that the rule declared is a sound one, having its foundation in reason and principle. Reforming a mistake in a written instrument so as to make it operate upon the property the parties intended it should operate, creates no new contract, nor does it even add additional obligations. It simply puts in the instrument what, in legal effect, was already there, the true description of the property. The instrument is only the evidence of the contract, it is not the contract; and reforming the evidence so as to make it accurately and truly describe the property is not making an executed contract out of an executory one. If the parties intended by their deed to evidence the conveyance of a certain parcel of land, and by mistake of the scrivener the deed is made to describe another, the court in making the correction does no more than place in the deed what in law, in equity, and in good conscience should be there, the description of the property intended to be conveyed. In causing the true de-

scription to be written in the deed, the court neither makes a new conveyance, nor alters an old one, it simply makes the conveyance effective by applying it to the property sold by one party and bought by the other. A doctrine which denies the authority of the courts to do this, however strongly supported, so far as mere numbers go, by adjudicated cases, does not commend itself to our sense of right and justice, and we can not give it our approval. We prefer the doctrine, that, if a deed untruly describes the property, courts may so reform it as to make it give a true description. In all cases where the deed is one which the parties had capacity to make, there should be power in the court to make it operate upon the proper property, and the fact that one of the grantors is a *feme covert* should not be allowed to lead to a denial of this power.

BAKER v. HATHAWAY.

1862. 5 Allen (Massachusetts), 103.¹

BILL in equity against a married woman, to enforce specific performance of a written executory agreement for the sale of her real estate; said agreement being signed by herself and her husband.

Defendant demurred.

W. F. Slocum, for defendant.

G. F. Hoar, for plaintiff.

DEWEY, J. 1. It is objected that a married woman cannot bind herself by an executory contract to convey her lands in fee. It is so at common law; and under immemorial usage in Massachusetts, authorizing a deed of conveyance executed by the husband and wife as the proper mode to pass the lands of the wife, it has always been held that the wife was not bound by any covenants contained in such deed. But by Gen. Sts. c. 108, § 3, "a married woman may bargain, sell or convey her separate real and personal property, and enter into any contracts in reference to the same." But no conveyance by her of an estate in fee simple is authorized by the statute "without the assent of her husband in writing, or his joining with her in the conveyance," or the consent of one of the judges, under certain circumstances stated in the statute.

This real estate was her sole and separate property, and she was under the statute authorized to sell and convey the same, having the assent of her husband in writing, or he joining with her in the conveyance. The husband, joining with her in the contract to convey the land, has thereby signified his consent to the same, and this obviates the objection that the wife could not be bound by a contract to sell, because she could not make a written conveyance without the assent

¹ Statement abridged. — Ed.

of her husband. It is urged on the part of the defendant that the authority given by the statute to a married woman to "bargain, sell and convey" imports nothing more than the right to give a deed of bargain and sale, technically so called. But we think that the whole section taken together implies more than this, and confers upon the wife the power to make an executory contract for the sale of her lands, in case she has the written assent of her husband, as provided in the statute. This would seem to be a necessary and useful power to be exercised in many cases as preliminary to an actual conveyance, and, under the same restrictions as to the concurrence of her husband as exist in relation to an actual conveyance, we are of opinion that such contract is a valid one.

[Remainder of opinion omitted.]

Demurrer overruled.

SECTION VII.

Wife's Capacity to Sue or Be Sued.

EMERSON v. CLAYTON.

1863. 32 *Illinois*, 493.¹

BREESE, J. On the twenty-first of February, 1861, an act was passed by the general assembly of this State, entitled "An act to protect married women in their separate property," which provides "That all the property, both real and personal, belonging to any married woman, as her sole and separate property, or which any woman hereafter married owns at the time of her marriage, or which any married woman, during coverture, acquires, in good faith, from any person, other than her husband, by descent, devise, or otherwise, together with all the rents, issues, increase and profits thereof, shall, notwithstanding her marriage, be and remain, during coverture, her sole and separate property, under her sole control, and be held, owned, possessed and enjoyed by her the same as though she was sole and unmarried; and shall not be subject to the disposal, control or interference of her husband, and shall be exempt from execution or attachment for the debts of her husband." Sess. Laws 1861, p. 143.

At the March Term, 1863, of the Clinton Circuit Court, the plaintiff in error filed her plaint in that court in replevin for certain chattels, against the defendant in error, claiming the chattels as her own property.

To this plaint the defendant pleaded in abatement the coverture of the plaintiff, at the time of the commencement of the suit. To this plea, the plaintiff replied that the property sued for, was, during her coverture, acquired in good faith from persons other than her husband, with her own money and in her own right, and as such remains her sole and separate property and under her sole control, in virtue of the act of February 21, 1861.

To this replication the defendant demurred, and the court sustained the demurrer.

The questions presented by these pleadings are important, and of the first impression in this court, and we have fully considered them.

Before the enactment of this law, there can be no doubt a *femme covert* could not sue alone for her own property, or institute any suit in her own name for the recovery of any of her rights. Indeed, she had no rights of personal property; all belonged by the marriage to her husband, which he might have reduced into his possession, and all was liable to become so subject.

¹ Statement and arguments omitted. — Ed.

The common law did not recognize the condition of a sole trader in a *femme covert*; nor did it contemplate a case where a wife might hold property separate and apart from her husband. By it, the personal estate of the wife vested in the husband, and gave him absolute dominion over it. In the progress of civilization, an artificial state of society has grown up incompatible, to some extent, with that state of simplicity from which many rules of the common law have been derived, and affecting in a serious degree, the artificial relations of society, and among them, that of husband and wife. In these days of excitement and speculation, by which fortunes are wrecked in a moment, and the innocent made to suffer from no misconduct of their own, it has been thought wise and expedient by the legislature of this and of other States, to protect the property of married women, not only from such catastrophes, but to remove it entirely from the control of her husband, and making her, as it regards such property, to all intents and purposes a single woman.

Such a change in the relative rights and powers of husband and wife, must, of necessity, give a different operation to the rules of law by which they are to be governed. The right being vested in the wife, by the statute, it must, if the act is to be enforced, remain intact until she consents to dispose of the property, for this right includes full dominion over it. Her rights, then, are the only rights affected, and on the well established principles of the law, she alone must bring suit for any invasion of them. By this statute, a married woman must, since its enactment, be considered a *femme sole* in regard to her estate, of every sort owned by her before marriage, or which she may acquire during coverture in good faith from any person not her husband, by descent, devise or otherwise, together with all the rents, issues, increases and profits thereof. And it is to be under her "sole control," and to be held, owned, possessed and enjoyed by her, the same as though she was sole and unmarried, and it is not subject to the disposal, control or interference of her husband, nor is it subject to execution or attachment for his debts.

Language more plain and explicit than this could hardly be used to express the intention of the legislature.

They designed to make, and did make, a radical and thorough change in the condition of a *femme covert*. She is unmarried, so far as her property is concerned, and can deal with it as she pleases. Having the "sole control" of it, there is no necessity of joining her husband in an action to recover it, or for trespasses upon it. The very object of the statute, it would seem, was to keep it out of the control of her husband in any and every respect; that the wife should be wholly independent of him in regard to it. If this were not so, the act itself would be futile and of no effect. The husband, for purposes of his own, might refuse to join in an action with the wife. He might connive with others to dispossess her of her property. He might prefer that her property should pay his debts, rather than his own should

be seized for such purpose, and if so, it is not to be supposed he would join in replevin, or in any other action to recover the possession.

We are well satisfied the act can have no very beneficial operation in favor of married women, or be effective in the protection of her separate property, unless the "sole control" conferred upon her over it, is made to extend to the commencement and prosecution of suits for its recovery, even against her husband, should he, contrary to her wishes, and in contempt of her rights, unlawfully interfere with it. The right of "sole control" over the separate property of the wife by her, necessarily confers the power to do whatever is necessary to the effectual assertion and maintenance of that right.

These views are sanctioned by the Supreme Court of Pennsylvania, under a statute similar, in most respects, to our own. (*Goodyear v. Rumbaugh and wife*, 13 Penn. 480; *Cummings' Appeal*, 11 id. 275.)

We see no other mode by which this statute can be made effectual for the purposes contemplated by the legislature, than by holding the wife, as to her separate property, to be in the condition of an unmarried woman, and capable of suing for its recovery in all courts.

The judgment of the Circuit Court is reversed, and the cause remanded, with instructions to overrule the demurrer to the replication, and to permit the defendant to make up an issue thereon, if he desires so to do.

SECTION VIII.

*Estoppel of Married Women.*¹

BODINE v. KILLEEN.

1873. 53 *New York*, 93.²

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, affirming a judgment in favor of plaintiffs, entered upon a verdict.

This was an action for goods alleged to have been sold and delivered by plaintiffs to defendant, a married woman, between May and September, 1869.

For several years prior to May 1st, 1869, the defendant had carried on business on her own account at 400 Broome street, in the city of New York, and was accustomed to purchase stock in trade of plaintiffs. Up to the early part of 1868 such purchases were made through her husband, acting as her agent. He being taken ill, she subsequently made the purchases and payments herself. On May 1st, 1869, she sold out to her husband, and he opened and continued a similar business for himself in Twenty-eighth street, and made purchases therefor of the plaintiffs upon credit.

The court charged the jury in effect that they were only to determine in this case whether notice was given plaintiffs by defendant of her retirement from business; that in case the plaintiffs had no such notice the verdict must be in their favor, to which defendant excepted; that if plaintiffs had notice of such fact or knowledge of facts sufficient to put them upon inquiry in respect thereof, and neglected to make it, the verdict must be for the defendant.

Defendant's council requested the court to charge the jury, that in case they were satisfied from the evidence that defendant at the time of the purchases in question was not actually engaged in business on her own account, no recovery could be had against her in this action. The court refused so to charge, and defendant excepted. The jury found a verdict in favor of the plaintiffs.

Moses Ely, for appellant.

Cyrus Lawton, for respondents.

ALLEN, J. With the removal of common-law disabilities from married women, corresponding liabilities have necessarily been im-

¹ As to the effect to be given to a personal judgment rendered against a married woman, by default, in an action to which her coverture, if pleaded, would have been a complete defence; see 1 *Freeman on Judgments*, 4th ed. s. 150; 1 *Black on Judgments*, ss. 190-192; *Van Fleet on Collateral Attack*, ss. 621, 622; Note in 55 *Amer. Decisions*, pp. 599-611. — ED.

² Arguments omitted. — ED.

posed upon them. They take the civil rights and privileges conferred, subject to all the incidental and correlative burdens and obligations, and their rights and obligations are to be determined by the same rules of law and evidence by which the rights and obligations of the other sex are determined under like circumstances. To the extent, and in the matters of business in which they are by law permitted to engage, they owe the same duty to those with whom they deal, and to the public, and may be bound in the same manner as if they were unmarried. Their common-law incapacity cannot serve as a shield to protect them from the consequences of their acts, when they have statutory capacity to act.

A married woman is *sui juris* to the extent of the enlarged capacity to act conferred by statute, and may be estopped by her acts and declarations, and is subject to all the presumptions which the law indulges against others with full capacity to act for themselves. (*Sherman v. Elder*, 24 N. Y. 381.) Where there is no legal capacity to contract, a party will not be estopped by falsely representing that he has capacity; that is, the incapacity is not removed by any fraudulent representation of the actor. The law will not permit one legally incapacitated to do that indirectly which he or she cannot do directly. That is especially the case in respect to infants and married women laboring under the common-law disabilities, the law imposing the disqualification from motives of public policy, and for the safety of those regarded as weak, and needing this protection. (*Keen v. Coleman*, 30 Penn. 299; *Lowell v. Daniels*, 2 Gray, 161; *Goulding v. Davidson*, 26 N. Y. 604.) But the reason of the rule ceasing with the removal of the incapacity, the rule falls. In the management and control of her separate property, when acting by agents, a *feme covert* is answerable for the frauds of her agent while acting within the scope of the agency, although the fraud may be without her knowledge or assent. (*Baum v. Mullen*, 47 N. Y. 577.) By statute (Laws of 1860, chap. 90) a married woman may carry on any trade or business on her sole and separate account, and the earnings from her trade or business are her sole and separate property, and she may sue and be sued in all matters having relation to her sole and separate property, in the same manner as if she were sole. She has all the legal capacity to do every act incident to the business or trade in which she may engage which a *feme sole* would have, that is, full legal capacity to transact the business, including, as incidents to it, the capacity to contract debts and incur obligations in any form, and by any means, by which others acting *sui juris* can assume responsibility.

This defendant, for many years prior to May, 1869, had been doing business in New York city as a retail grocer, buying her goods of the plaintiffs on credit. During most of the time, and until some time in the year 1868, her husband had acted as her agent in making the purchases and payments. The husband was taken ill in 1868, and from that time she made the purchases and payments to the plaintiffs, but

there was no revocation of the agency of the husband. About the first of May she transferred the business to her husband, who subsequently carried it on at a different place in the same city, and bought the bills of goods, for which action is brought, during the month of May. The jury has found that there was no notice to the plaintiffs of the change in the business, and that they had no knowledge of it. Credit was in fact given to the defendant, and not to her husband. The plaintiffs had the right to presume that the business of the defendant, and the agency of her husband in respect to it, continued until actual notice of change in the business, and a revocation of the agency. Suffering the plaintiffs to act upon this presumption, she is estopped from alleging the contrary. She had capacity to continue the business in which she had been engaged, and whether she expressly represented to the plaintiffs that the business was still hers and her husband was her agent, or the facts were legally and naturally inferable from her acts or her silence, is immaterial. She is bound by the appearances which she has given to the transaction, and upon the faith of which others have acted, up to the limits of her legal capacity to act. In other words, to the extent of her legal capacity, the apparent authority of the husband to act for and bind her must be taken as the real authority, so far as others have been induced to act upon it, and have parted with their property upon the faith of it. It is simply because the defendant had the power to contract the debt for which this action is brought, that she may be estopped by her acts from disputing her liability, and the existence of this capacity takes the case out of the principle of the authorities relied upon by the counsel for the appellant. This is the only question presented by the record, or urged by the appellant, although it is made the subject of several exceptions in different forms upon the trial. The case was well disposed of at the circuit.

The liability of the defendant does not depend upon the fact that she was actually carrying on a business or trade on her sole and separate account, but upon her capacity to do so, with the other circumstances establishing her liability.

The judgment must be affirmed.

SMITH v. WEEKS.

1892. 65 Vermont, 566.¹

ASSUMPSIT. Heard upon the report of a referee at the March Term, Essex county, 1892, ROWELL, J. presiding. Judgment for the plaintiffs. The defendant excepts.

¹ Arguments omitted. — Ed.


The suit was predicated upon a promissory note given in part payment for two lots of corn. The defendant was a married woman whose husband was engaged in logging and had failed in this business the previous season. In point of fact he had taken another job the season in question and the corn was received and used by him in that job. When she ordered the corn, the defendant represented to the plaintiffs that she had taken the logging job in her own right, and that her husband had nothing to do with it, and the plaintiffs furnished the corn on the strength of these representations.

Bates & May, for defendant.

Wm. Heywood and J. I. Williams, for plaintiffs.

START, J. R. L. s. 2,321, provides that a married woman carrying on business in her own name may sue and be sued in all matters connected with such business in the same manner as if she were unmarried. Under this statute, the defendant had authority to bind herself in respect to all matters connected with business carried on by her in her own name. She could bind herself in respect to such business as she represented to the plaintiffs that she was carrying on, and she having, at the time or just before the corn was delivered, and in connection with the transaction, represented to the plaintiffs that she had taken a logging job, and that she wanted grain to use in connection with the job she had taken, and the plaintiffs having relied and acted upon these representations, she cannot, for the purpose of avoiding payment, be heard upon the question of whether her representations were true or false. She had authority to engage in the business she represented she was undertaking, and the plaintiffs had a right to rely upon her statements and were not bound to inquire further. Married women cannot enjoy the enlarged rights of action and of property given by our statute and remain irresponsible for the ordinary results of their conduct. Incident to the powers given to married women by our statute is the capacity to be bound and to be estopped by their conduct. *Sargeant v. French*, 54 Vt. 385; *Brown v. Thomson*, 31 S. C. 436 (17 Am. St. Rep. 40); *Lane v. Schlemmer*, 114 Ind. 296 (5 Am. St. Rep. 621); *Knight v. Thayer et al.*, 125 Mass. 25; *Patterson v. Lawrence*, 90 Ill. 174 (32 Am. Rep. 22); *Rusk v. Fenton*, 14 Bush, 490 (29 Am. Rep. 413).

Judgment affirmed.



*Case is wrong.
Gif says*

FARMINGTON NATIONAL BANK v. BUZZELL.

1880. 60 *New Hampshire*, 189.¹

ASSUMPSIT, upon two joint and several promissory notes made in 1878, signed by the defendants, and payable to the plaintiffs or order. The name of Josie M. F. Buzzell was first upon the notes. Samuel H. Buzzell and Jacob P. Buzzell were defaulted. Josie M. F. Buzzell pleaded that at the time of making the promises she was and still is the wife of said Samuel H. Buzzell, and that the promises were made as surety for her husband; and upon the trial the issue was, whether the defendant, Josie M. F. Buzzell, signed the notes as surety, or in behalf of her husband, or as principal.

The notes being produced in evidence, and the name of Mrs. B. appearing as principal and first upon them, the plaintiffs' counsel contended that she was estopped from showing that she signed the notes as surety for her husband, or that her promises were an undertaking in his behalf; but the court ruled otherwise, and allowed her to introduce evidence tending to show that she was in fact surety only upon the notes; and the plaintiffs excepted. The plaintiffs requested the court to instruct the jury that if the notes in suit were presented to the bank by Mrs. B., or her agent, bearing her name as principal, and were accepted by the bank with the understanding that she was principal, she is to be holden as principal unless it was made known to the bank that the contract was really one of suretyship, or for or on account of the husband. The court declined to give these instructions, and instructed the jury that if the notes were in fact executed by her as surety, or for and on account of her husband, she is not liable, although the plaintiffs did not know these facts, but understood and believed when the notes were discounted that Mrs. B. signed them as principal; and the plaintiffs excepted. The jury returned a verdict for the defendants, which the plaintiffs moved to set aside.

Cochrane and A. R. Hatch, for plaintiffs.

Copeland & Edgerly, for Mrs. Buzzell.

FOSTER, J. The question presented by the case is, Can a wife bind herself as a surety for her husband? It is conceded that at common law she could not, acting for herself, enter into such a contract. But the common law disability of married women, as judicially interpreted in a former state of society, has been essentially modified by the development of a later and different state of society; and their rights have been enlarged and defined both by adjudication and legislation. In this case it is attempted to hold Mrs. Buzzell personally liable as the surety of her husband on the notes in suit.

¹ Arguments omitted. — ED.

Whether she received and used the money represented by the notes, is a question which is immaterial in our present inquiry. *Messer v. Smyth*, 58 N. H. 298; *Yale v. Wheelock*, 109 Mass. 502; *Hall v. Butterfield*, 59 N. H. 354; *Bartlett v. Bailey*, 59 N. H. 408.

The General Laws (c. 183, s. 12) provide that a married woman "may make contracts, and sue and be sued in all matters in law and equity, and upon any contract by her made . . . as if she were unmarried; . . . provided that no contract or conveyance by a married woman of property held by her in her own right as surety or guarantor for her husband, nor any undertaking by her for him or in his behalf, shall be binding on her." This statute, it is claimed, gives her capacity to make the contract of suretyship for her husband, because it gives her capacity to make other contracts, and that, being qualified to make the contract, she may be estopped to claim the protection of the statute. This reasoning is based on the assumption that all her common-law disabilities as to contracts are removed. But it was evidently the legislative intention to leave her, in cases like the present one, subject to the protection of the common law. The proviso in the statute is, in effect, a reenactment of the common-law disability of a married woman to be a surety for her husband. *Major v. Holmes*, 124 Mass. 108.

As Mrs. Buzzell did not possess the legal capacity to make this contract, the plaintiffs, however innocent, cannot enforce it against her. 1 Pars. Notes and Bills, 276, 277. *Burley v. Russell*, 10 N. H. 184. Concealment, fraud, or falsehood as to her relation to the contract, cannot confer capacity on her so as to entitle the plaintiffs to an action against her on the contract. *Lowell v. Daniels*, 2 Gray, 161. For false representations and fraud a party may be subjected to punishment and to damages in a proper form of action, and legal incapacity to make a contract would not necessarily be a bar to the action. *Fitts v. Hall*, 9 N. H. 441. At common law a married woman is not estopped by her covenants, and she cannot by her own act enlarge her capacity to bind her separate estate. *Palmer v. Cross*, 1 Sm. & M. (Miss.) 48; *Jackson v. Vanderheyden*, 17 Johns. 167. Her disqualification as a party to a contract prevents the application of an estoppel; otherwise it could be said that though she cannot make a contract because of her incapacity, when she attempts to make one by fraud or misrepresentation, legal ability is in some way conferred by estoppel; that is, she is not qualified to make a contract for herself, but is liable on one that she unsuccessfully tries to make. *Keen v. Coleman*, 39 Penn. St. 299; *Lowell v. Daniels*, 2 Gray 161, 169; *Burley v. Russell*, 10 N. H. 184. In cases of torts she may be estopped to deny that her representations are true; but in such cases her legal incapacity to bind herself by contract is not denied or qualified, and is not material as a ground of defence. Big. Est. 488, 490; *Liverpool Adelphi Loan Association v. Fairhurst*, 9 Ex. 422.

Although the acceptor of a bill or the maker of a note is estopped to say that the drawer and payee, or indorser, is an infant or a married woman, it does not follow that the infant or the married woman would be estopped to plead their incapacity. The maker of a negotiable note warrants that the payee has authority and capacity to transfer the title by indorsement; and if the payee happens to be a married woman, he makes the same warranty as to her capacity; but her disability to make a contract is not his disability to make the warranty. Therefore, in an action on the note, while he would be bound by his warranty of her capacity to make the indorsement, she would not be bound, because at common law she is not a competent party to the contract. *Sto. Prom. Notes*, s. 87; *Byles Bills* 64; *George v. Cutting*, 46 N. H. 130; *Drayton v. Dale*, 2 B. & C. 293; *Taylor v. Croker*, 4 Esp. 187.

Judgment on the verdict.

SECTION IX.

Contracts and Conveyances between Husband and Wife.

(a) GENERALLY.

ALLEN v. HOOPER.

1862. 50 Maine, 371.¹

ONE question in this case was as to the validity of a deed executed by a married woman, in 1856, purporting to convey her real estate directly to her husband.

By Act of 1847, c. 27, a conveyance of land by a husband directly to his wife passes the title, except as against the creditors of the husband.

The Act of 1852, c. 227, provides that "any married woman who is or may be seized and possessed of property, real or personal, as provided for in the Acts to which this is additional, shall have power to *lease, sell and convey*, and *dispose of the same and to execute all papers necessary thereto in her own name as if she were unmarried*, and no action shall be maintained by the husband for the possession or value of any property held or disposed of by her in manner aforesaid."

Wisicell, for complainant.

B. W. Hinckley, for respondent.

APPLETON, C. J.

The general power to lease, sell, convey or dispose of her estate, is given to the married woman, "*as if she were unmarried*." Stronger or more explicit language can hardly be imagined. No restriction is imposed upon the power of leasing, selling or conveying. If unmarried, she could convey to the person, whom she might thereafter marry. But the marriage is no impediment to the exercise of the new powers thus given her. Her right to convey remains thereby unaffected.

The actions, which are prohibited, are those which by the common law, a husband might bring to vindicate his rights of possession or his claims for damage, in case the wife had undertaken previous to the passage of the above Acts to do, what therein and thereby, she is authorized to do. These Acts have conferred new and extensive powers on the wife. They enlarge her rights. They restrict and destroy those of the husband. The real and personal estate of the wife is liberated from the control of the husband. The disposition of it, without reference to his wishes, is given to the wife. She may transfer to a stranger. She is equally at liberty to convey it to her husband.

¹ Statement abridged. Portions of opinion omitted. — Ed.

If she could not, there would be a restriction upon her power of disposal, as "if she were unmarried." But none such is to be found.

The result is that the common law has been changed, and that henceforth the wife may deed directly to her husband.

[Remainder of opinion omitted.]

WHITE v. WAGER.

1862. 25 *New York*, 328.¹

AUG. 15, 1849, the defendant's wife, being then the owner of certain real estate, executed a deed, purporting to convey said real estate directly to the defendant. Defendant subsequently conveyed the premises to the plaintiff, who now sues to recover back the consideration paid. The sole question is, whether the title to the land passed to the defendant by his wife's deed. The Supreme Court held that it did not, and gave judgment for plaintiff. Defendant appealed.

Samuel Love, for appellant.

Marcus Lyon, for respondent.

DENIO, J. It is an established doctrine of the common law, that, in consequence of the unity of person between husband and wife, neither the husband nor the wife can grant, the one to the other, an estate in possession, reversion or remainder, to take effect in possession during the life time of the grantor. (Littleton, § 168; Co. Litt. 3, *a*, 112, *a*; Hargrave's Note, 12, and cases referred to; Bell on Property of Husband and Wife, 470; *Firebrass v. Pennant*, 2 Wils. 254; *Shepard v. Shepard*, 7 John. Ch. 57; *Voorhees v. The Presbyterian Church of Amsterdam*, 17 Barb. 103, and cases cited by HAND, J.; *Simmons v. McElhain*, 26 Barb. 419; *Dempsey v. Tylee*, 3 Duer, 73.) There are some exceptions to the rule, not necessary to be adverted to here, but which will be found sufficiently stated in the treatise of Mr. Bell, at the place cited. The rule itself is one of those stubborn mandates of the common law which requires absolute obedience from the courts, whatever they may think of the justice or equity of its application in a particular case. In the case referred to, from Wilson's Reports, where a provision by a husband for his wife was in question, the judges said they would be glad, if possible, to get over that maxim of law, that "a husband and wife are one person," and, therefore, cannot grant lands to one another. "But," they said, "we are dealing with a fundamental maxim of the common law, and might as well repeal the first section of Littleton, as to determine this grant from the husband immediately to the wife to be good, and where there is not so much as the shadow of a person intervening." The reporter adds, that the *postea* was ordered

¹ Statement abridged. — Ed.

to be delivered to the defendant, "*reluctante tota curia.*" But it is, nevertheless, a very technical principle; and where the design is for a husband to convey to the wife, it may be evaded, in various ways, as by a feoffment to a third person to the use of the wife, or a covenant with a third party to stand seised to the use of the wife (Bell, *ut sup.*); or, where the wife desires to convey to her husband, the two may join in a conveyance to any one whom they can trust to convey immediately to the husband; and thus the title will be vested in him. (*Merriam v. Harsen*, 2 Barb. Ch. 232.)

Thus far, there is no serious controversy between the counsel for the respective parties; but the defendant's counsel insists that, if it be assumed that this conveyance of Mrs. Wager to her husband would be void at common law, the recent statutes respecting married women have changed the rule, and that now a wife may execute a valid conveyance to her husband, notwithstanding their coverture. In examining these statutes, it is necessary to bear in mind that the wife was formerly subject to other disabilities except the want of power to make a conveyance to her husband. At common law, she could not convey to any one except by the expensive and dilatory process of fine and recovery; but afterwards, by statute, she was enabled to execute a valid deed of her lands by joining with her husband, and submitting to an examination to show that she acted without coercion; but she could not devise her lands. As to her capacity to acquire the title to property to her own use, the rule was, that all the personal estate which she possessed at her marriage, and all which came to her by any title during coverture, even when received as a compensation for her personal services, vested immediately in her husband, unless it was protected by a settlement to her sole and separate use. If she was the owner of land at the time of her marriage, or acquired title to it during coverture, the husband immediately became entitled to the rents and profits of it, and was at once seised of a freehold estate in it. None of these disabilities attached to the condition of a married man, who was as free to receive the title to property, and to dispose of it, after marriage as before, with the single exception that he could not be the grantee of a deed executed by his wife, or make a grant directly to her. As to the world in general, the estate of marriage did not affect his ability to acquire title to, or to dispose of his property just as he might have done if he had not been married. I except, of course, from this remark, the subject of dower, the inchoate right to which the husband could not dispose of. But it was never supposed that the husband's rights and powers as to property, as affected by the marriage relation, ought to be, or were, susceptible of being increased. The marriage imposed no disability on his part which any one considered a social grievance. On the contrary, the complaint was that his rights were too great, and ought to be diminished. But as to the wife, there came to be a pretty strong sentiment that she was the victim of an oppressive legal system, from which she ought to be relieved. This was a

prominent subject of debate in the Constitutional Convention which sat in 1846; and the substance of the subsequent act of 1848 was at one time incorporated into the project of the new Constitution, but it was finally rejected by a close vote. (Debates, by Crosswell and Sutton, pp. 55, 116, 794, 795, 811-813.) The advocates for a reform as to the legal condition of married women then addressed themselves to the legislature, and the result, in the first instance, was the act of 1848 (ch. 200). It constituted the wife the sole proprietor of all the property of both kinds which she should own when she came to be married, and of all which should devolve upon her by any title during the coverture. It attempted to divest rights already vested in her husband under the antecedent law, but as to that it was ineffectual. (*Westervelt v. Greig*, 2 Kern. 202.) But it did not confer upon her the capacity to convey or devise real estate. (*Wadhams v. The American Home Missionary Society*, 2 Kern. 415.) This was done by the act of 1849 (ch. 375), which authorized a married woman to convey and devise real and personal property, and any interest or estate therein, and the rents, issues and profits thereof, in the same manner and with the like effect as if she were unmarried. The first mentioned act is entitled, an act for the more effectual protection of the property of married women; and the other is an act to amend the one first mentioned. But independently of this explicit statement of the object of the legislature, it would be quite apparent from the provisions of the acts that the design was, not to confer any additional advantages upon married men, but that it was intended solely for the benefit of the other party to the marriage relation: what is now claimed for the act of 1849 is, that it enables a husband to take a title to realty directly from his wife, contrary to the rule of the common law which has been referred to. We would not expect to find in a law, passed professedly to shield the property of married women from the control of their husbands, a provision making it more easy for the latter to acquire such control. Beyond all doubt the greatest peril to which the separate estate of the wife is exposed, is her disposition to acquiesce in placing the title to it in the hands of her husband. This the common law prevented to a certain extent by rendering her direct conveyance to him void. I am quite confident that the legislature which passed the acts of 1848 and 1849, would not knowingly have repealed that prohibition in the interest of the husband. If it had been intended to interfere with the doctrine at all, it would have been in the interest of the wife. Now, we know that the common law rule was in the contemplation of the legislature when these statutes were under consideration, for in both of them the power of a *feme covert* to take property by gift, grant, &c., is limited by the qualifying words, "from any person other than her husband." Thus it will be perceived that they refused to abrogate the rule where the question was respecting conveyances from the husband to the wife, though the disability of the latter to take property to her own use was the evil which it was intended to remedy. The ability of

the husband to take property conveyed to him was not at all under consideration, and he was left to such rights in that respect as the antecedent law gave him.

But it is argued that the power in terms given to a married woman, by the act of 1849, "to convey and devise real and personal property," "as if she were unmarried," embraces all manner of conveyances, and necessarily includes any which she might make to her husband. No doubt there was an intention to confer upon the wife the legal capacity of a *feme sole*, in respect to conveyances of her property, but this does not prove that she can convey to her husband, for no such question could possibly arise in respect to a *feme sole*, there being no person to whom, in respect to conveyances as made by her, the rule of the common law could apply. By assimilating the case of a wife to that of an unmarried woman, the legislature merely meant to say that she should have the same power as though she were not under the disability of coverture. Taking away that disability, she would have power to make all such conveyances as were not forbidden by special provisions of law; but such general statutes are never understood to overreach particular prohibitions, founded on special reasons of policy or convenience. Corporations cannot, in general, take title to lands by will. The removing of the disabilities of *femes covert* would not allow them to make a devise to a corporation not authorized to take. It is not the disability of the wife alone which would, by the common law, render void her conveyance to her husband. The husband is as much disabled to take under such a conveyance as she was to convey. Therefore, to render the conveyance valid, the husband's disability, as well as that of the wife, must be removed; but, as has been remarked, there is no language in these acts, and nothing in their apparent intention, which looks to the removal of any disabilities under which he labored.

Upon the whole, I am of opinion that the acts of 1848 and 1849 have no influence upon the case, and that the principle which renders direct conveyances between husband and wife void, applies to her deed under which the defendant claimed title to the premises in question.

I agree, also, with the Supreme Court, that the defective conveyance cannot be aided by the application of equitable principles. It was wholly without consideration, and in such cases equity does not interfere. (See the cases cited in *Shepard v. Shepard*, 7 Johns. Ch. 57.)

The judgment of the Supreme Court must be affirmed.

WRIGHT and SMITH, JJ., dissented.

Judgment affirmed.

BURDENO v. AMPERSE.

1866. 14 *Michigan*, 91.¹

CAMPBELL, J. Burdeno sued plaintiffs in error in trespass for alleged wrongful acts upon his freehold, being land covered by water. The suit was for treble damages to Burdeno, as proprietor of the land, the statutory action not lying for mere possession. *Achey v. Hull*, 7 Mich. 423. Defendants offered to show that Burdeno had, in September, 1861, conveyed the property by deed to his wife, Victoria Burdeno. This deed was objected to as invalid, because of the relation of the parties; and the Court below sustained the objection, and rejected the evidence.

The question is presented, therefore, whether, as our laws now stand, a deed can be made by a husband to his wife. To determine this question, we must see how their relations were governed, in this respect, before our present system was introduced. *24 Ed.*

The effect of marriage was to produce what is called in the law-books *unity of person*; the husband and wife being but one person in the law. Co. Litt. 112 a; 1 Bl. Com. 442. The wife, by her coverture, ceased to have control of her actions or her property, which became subject to the control of her husband, who alone was entitled, during the marriage, to enjoy the possession of her lands, and who became owner of her goods and might sue for her demands. The wife could neither possess nor manage property in her own right, could make no contract of a personal nature which would bind her, and could bring no suit in her own name. In short, she lost entirely all the legal incidents attaching to a person acting in her own right. The husband alone remained *sui juris*, as fully as before marriage.

It followed from this legal merger by coverture into a single personality, that the husband could make no grant to the wife, and the wife could make none to the husband. And furthermore, a grant to her by her husband, of a freehold, would be, in effect, a grant to take effect *in futuro* (the husband retaining possession for life), and such a grant was unlawful because a freehold could only pass by "*livery of seisin*," which must operate either immediately or not at all. It would, therefore," continues Blackstone, "be contradictory, if an estate, which is not to commence till hereafter, could be granted by a conveyance which imports an immediate possession." 2 Bl. Com. 165. But a husband might make a devise to his wife, "for that such devise taketh no effect but after the death of the devisor." Littleton, § 168; Co. Litt. 112 a, b. The same incidents of coverture which made the husband sole possessor of his wife's lands, led to the rule which made estates in their joint names differ from joint tenancies proper, and

¹ Statement omitted. — Ed.

regarded the title, not as held by moieties, but as an entirety. 2 Bl. Com. 182; Co. Litt. 187 *a*.

Whether the common law rule preventing husband and wife from making grants to each other is a rule springing from, and inseparably attached to, the relation of marriage, or whether it is an incident to the wife's disability to control property in her own right, must guide us somewhat in determining the effect of our enabling statutes. There can be no doubt that there are incidents of marriage independent of all considerations of property. The common law writers never attempted to classify them, and we must get such light as we can from examples and analogies. It is safe, however, to assume that no act can be absolutely inconsistent with the marriage relation, if it has received the sanction of either law or equity. We must, therefore, see whether the disabilities which applied at common law, in cases like the one before us, have been regarded as universal and personal disqualifications. Upon this we have an abundance of authority.

There were *local customs* whereby a wife might take by *immediate* conveyance from her husband; as, for example, at York. Fitzh. Ab. Prescription, 61; Brown's Ab. Custom, 56 (cited Tomlyn Law Dic. Baron and Feme). The Queen Consort may sue and be sued, alone, may take grants from her husband, as well as from strangers, may take as well as receive grants, and may covenant. Com. Dig. Roy, F. 1. A husband could convey to the use of his wife under the Statute of Uses, whereby the use vested in her directly as a legal estate, without the action of the feoffee. Com. Dig. Baron and Feme, D. 1, citing Co. Litt. 112 *a*. And he might under the same statute covenant with a third person to stand seised to the use of his wife. *Id*.

It appears, therefore, that the law did not prohibit a husband from accomplishing for his wife the precise thing which he would have accomplished by a direct conveyance; and it would seem from this that the rule was one of technicality, and not of substance. But there are further illustrations which will throw light upon the subject. When husband and wife were dealing, not in their own right but in a representative character, or what is termed technically, *in auter droit*, either might sell and convey to the other, as to a stranger. Co. Litt. 112 *a*, 187 *b*; Com. Dig. Baron and Feme, D. 1. It needs no remark to suggest that if the common law was designed to produce unity of will, and to prevent action except by one not under influence or compulsion, no such practice as this could be permitted; for a husband's influence over his wife is personal, and will operate just as strongly, in fact, in one class of dealings as in another. The rule can only be made sensible by holding that, as to matters which a wife could be allowed to hold and manage separately from any interest of her husband, these disabilities of coverture did not exist, or, in other words, that they were not regarded as personal only, but as relative to property. Thus far we have considered only such rights as are *legal*, as distinguished from equitable, and are enforced in all courts alike. But there has

grown up by the side of the common law; a system of equitable rights and powers, which places married women, in regard to property, on the same footing in most respects with single women. When property is set apart for the *separate use* of a married woman, she is, in regard to it, emancipated from the disabilities of coverture, so far as the terms of the trust warrant. This emancipation from her legal disabilities does not depend upon the husband's consent, nor upon any antenuptial agreement. It can be accomplished by any one, relative or stranger, who sees fit to provide a fund for her benefit.

She may sue and be sued concerning it; she may contract concerning it, and her contracts will bind it and be enforced; she may give it, or sell it. Her title is technically an equitable one, and not a legal one; but the trustees are bound to follow her directions, and the distinction is purely formal. The income and proceeds are under her separate control and enjoyment, and her husband has nothing to do with them. Her doings, though not under the dominion or enforcement of courts of law, are recognized by such courts as valid, just as they are recognized and enforced in equity. If the legal disabilities were essential elements of coverture, then equity, which recognizes and follows all the substantial principles of law, could not dispense with them. It would be a gross absurdity for any court to destroy the substantial rights of the husband, or remove his lawful control. And it would be still more absurd to permit this interference at the hands of any meddling stranger at his option. But the doctrine has been long settled that as to her separate estate a wife is on substantially the same footing with a *feme sole*. See *Pybus v. Smith*, 1 Ves. Jr. 189; *Sturgis v. Corp*, 13 Ves. 190; *Essex v. Atkins*, 14 id. 542; *Wagstaff v. Smith*, 9 id. 520; *Grigby v. Cox*, 1 Ves. Sen. 518; *Freeman v. Moore*, 1 Bro. P. C. 237; 1 Hov. Sup. 49-50; 2 Spence's Eq. Jur. 513; *Jacques v. Methodist Episcopal Church*, 17 Johns. 548; 2 Story Eq. Jur. § 1395-6.

Not only may she make disposition of it to others, but she may do so also in favor of her husband. The disability of the common law which arose from the very fact that she was *sub potestate viri* (and which undoubtedly is usually the case as a matter of fact to a great degree), was not considered as existing in equity, which sustained such dealings if fair and not unduly biased. 2 Story Eq. Jur. § 1395; *Essex v. Atkins*, 14 Ves. 542; *Jacques v. Methodist Episcopal Church*, 17 Johns. 548; 1 Hov. Sup. 49, and cases above. She can even bargain with her husband concerning her separate estate, and the agreement will be enforced: *Lady Arundel v. Phipps*, 10 Ves. 140; *Livingston v. Livingston*, 2 Johns. Ch. 537; *Wallingford v. Allen*, 10 Pet. 583; *Bullard v. Briggs*, 7 Pick. 533.

Instead of looking with disfavor upon the settlement of separate property, equity has favored it. A separate estate will not fail for the lack of trustees, and if the legal title comes into the husband's hands, he himself will be held to be a trustee to his wife's separate use and

therefore subject to her orders ; and he may be made a trustee expressly. 2 Kent's Com. 162 ; 2 Spence's Eq. Jur. 507 ; *Wallingford v. Allen*, 10 Pet. 583. Not only may a husband settle property to his wife's use through trustees, but he may make himself a trustee by agreement, or even by gift, where he has by some distinct act set apart the property. In *Lucas v. Lucas*, 1 Atk. 270, where a husband caused stock to be transferred to the name of his wife, although at law it would of course continue to be his own property, it was held to have been made his wife's separate fund. So in *Shepard v. Shepard*, 7 Johns. Ch. 57, and in *Wallingford v. Allen*, above cited, it was held that a conveyance directly from husband to wife should under the circumstances be enforced as valid in equity.

When equity recognizes a power in the wife, who is the disabled party, not only to deal with others, but even to contract with and make provision for her husband out of her separate funds, it can hardly be claimed that the husband, who was always *sui juris*, is restrained by any but technical rules from transferring to her directly. We have seen that equity will enforce even such conveyances. But there never was a time when he could not by his deed put property where she could control it. If it were not that by standing in her name he became legally the owner of the usufruct, there could be no valid reason why any indirection ever need be resorted to. It is not against the policy of the law that the wife should have the real benefit of his gift ; and equity, looking through the form at the substance, calls it, as it is in fact, a gift from husband to wife. The doctrine laid down by Coke, in connection with the Statute of Uses, is of itself sufficient to show that the disability as to conveyances springs entirely from the wife's incapacity to act for herself ; and it is stated in 2 Kent's Com. 163, *n. b*, that by the present English statutes a husband is now authorized to make a direct conveyance to his wife.

Our statutes have given power to a married woman to enjoy, contract, sell, transfer, mortgage, convey, devise, or bequeath her property in the same manner, and with the like effect, as if she were unmarried. 2 C. L. § 3292. Where it stands in trust for her, the trustees are authorized to transfer it to her. 2 C. L. § 3293. The statute evidently designs to do away with indirect dealings, and make her rights legal instead of equitable. Passive trusts have been entirely abolished, and where a deed creates them the title passes at once to the beneficiary. 2 C. L. § 2633-4-5. To require a husband (who is not supposed to be under her control or fear) to go through the farce of conveying to some one else, who is at once to pass the property over to his wife, is to keep up a fiction which has not even a legal basis to support it, since the husband has ceased to have possessory claims over her property. He is now in law a stranger to her estate during coverture, instead of its possessor and manager ; and his consent is not necessary to her disposal of it. *Farr v. Sherman*, 11 Mich. 33 ; *Watson v. Thurber*, 11 id. 457. Whatever protection she may require

when dealing with him, he certainly never was supposed to need any against her.

Believing, as we do, that the basis of the common law disability was in the peculiar disqualifications and burdens of the wife, and that the removal of these removes all the reasons which ever required the intervention of equitable trusts, we think there is now no objection to a deed from husband to wife, which should render it invalid.

The Court erred in excluding the deed. The other points become immaterial.

Judgment must be reversed, with costs, and a new trial granted.

CHRISTIANCY and COOLEY, JJ., concurred.

BOARD OF TRADE ET ALS. v. MARY HAYDEN.

1892. 4 *Washington*, 263.

APPEAL from Superior Court, Whatcom County.

The facts are stated in the opinion.

Slade, Hadley & Hadley and *Bruce & Brown*, for appellant (Mary Hayden).

Dorr & Finch, Strudwick, Peters & Van Wyck, Fairchild & Rawson and *Allen & Powell*, for respondents.

STILES, J. These were four cases the trials of which were consolidated. In two of the cases the theory of the complaints was that appellant and her husband were actual partners in the mercantile business under the firm name of J. P. Hayden & Co. In the other two the theory was that the community composed of the husband and wife was carrying on business, and that the husband and wife were its agents. The evidence did not tend to support either theory as pleaded, but was directed wholly to an effort to show that J. P. Hayden was doing business under the name of J. P. Hayden & Co., and that appellant made herself liable as a partner by "holding out." The real object in making appellant a party, and taking judgment against her, was to subject certain real estate which she claims is her separate property, to the payment of debts incurred by J. P. Hayden & Co. The main question involved is, Can a husband and wife become partners in trade in this state? It is claimed that they may under the act of November 21, 1881, commonly known as chapter 183 of the code of that year. Of that chapter the following sections are supposed to be especially pertinent to the matter in hand:

"SEC. 2396. Every married person shall hereafter have the same right and liberty to acquire, hold, enjoy and dispose of every species of property, and to sue, and be sued, as if he or she were unmarried."

"SEC. 2398. All laws which impose or recognize civil disabilities

upon a wife, which are not imposed or recognized as existing as to the husband, are hereby abolished, and for any unjust usurpation of her natural or property rights, she shall have the same right to appeal in her own individual name, to the courts of law or equity for redress and protection that the husband has."

"SEC. 2400. The property and pecuniary rights of every married woman at the time of her marriage, or afterwards acquired by gift, devise or inheritance, with the rents, issues and profits thereof, shall not be subject to the debts or contracts of her husband, and she may manage, lease, sell, convey, encumber or devise by will such property to the same extent and in the same manner that her husband can property belonging to him."

"SEC. 2401. Should either husband or wife obtain possession or control of property belonging to the other, either before or after marriage, the owner of the property may maintain an action therefor, or for any right growing out of the same, in the same manner and to the same extent as if they were unmarried."

"SEC. 2406. Contracts may be made by a wife and liabilities incurred, and the same may be enforced by or against her to the same extent and in the same manner as if she were unmarried."

Prior to the act of 1881, but for the acts commencing in 1869, the common law would have regulated the property rights of husband and wife. It did then and still does regulate them excepting so far as the statute has directed otherwise; and notwithstanding that this act provides in § 2417 that the "rule of common law that statutes in derogation thereof are to be strictly construed has no application to this act," it is not to be supposed that the legislature intended or proposed to extend the scope of the act beyond the language used further than the implications naturally flowing therefrom. At the common law a wife could not be a partner in business with anyone, because partnership is based on a contract, as to which she was under a disability, and yet in equity she had always been permitted to enforce contracts made for her benefit, even with her husband, and her claim against him as her debtor had always been sustained. Story, Eq. Jur., §§ 1372, 1373; *Valensin v. Valensin*, 28 Fed. Rep. 599; *Clark v. Hezekiah*, 24 Fed. Rep. 663; *Huber v. Huber's Admr.*, 10 Ohio, 372. She could have a separate estate, meaning an equitable estate held by a third person in trust for her. This estate she could charge in equity, but not at law. Judgments upon her debts went not against her person, when allowed at law, but were allowed as equitable burdens upon her estate or personal property in possession at the time of the marriage and that acquired afterward; her choses in action when reduced to possession, and her earnings became her husband's; in her freeholds and lands in fee the husband took a life estate; he became liable for her antenuptial debts and jointly with her for her torts during coverture; her responsibility at law for contracts was entirely suspended; and in equity, before the

courts would hear anything against her, it must appear that she was possessed of a separate estate in the common law sense. Now this act of 1881 does certain things for a married woman: *First*, It gives her full dominion over her own property whether acquired before or after marriage, to enjoy and dispose of it without the intervention of her husband, or responsibility for him or his debts; *second*, it removes from her all civil disabilities not imposed upon her husband; *third*, she can sue and be sued as if she were unmarried, either at law or in equity; *fourth*, for her debts she alone is responsible; *fifth*, her property is chargeable with family expenses. In short, the purpose of the act seems to be to set her free from all influence or dominion of her husband in so far as her property rights are concerned, and leave her to manage, control and dispose of them as she pleases, whether to her gain or loss.

In this opinion we shall not discuss the question how large her power is, but confine ourselves to the single matter before us. Counsel for respondents contend that, as it is the evident purpose of these provisions to emancipate the wife from the control of the husband, and to enfranchise her with the power, denied to her under the common law, to acquire, hold, enjoy and dispose of property, and do business on her own account as freely as he can, or even more freely than he can, under the same act, it must follow that she can enter into a contract of partnership in all the ways, and with all the liabilities that her husband can, and that unless she is permitted and held to be able to enter into the same contracts with him that she can with others, she is deprived of the full measure of liberty which the law intends to confer upon her. It may be said that she can and in some cases will be held to become a general partner with third persons under the terms of the act, and the necessary implications thereof. It has been so held in *Newman v. Morris*, 52 Miss. 402; *Abbott v. Jackson*, 43 Ark. 212, and elsewhere, when no one of the persons engaged with her as partners was her husband. But the question still remains, does the statute intend that she can enter into ordinary contracts with her husband, and particularly the contract of partnership? On this point we think the position of the respondents is antagonistic to itself. In the foreground of the discussion is placed the proposition that the purpose of the statute is to free the wife from the control and influence of her husband, and to relieve her property from his debts and management; but the next following suggestion, that unless she can become his partner she will not be wholly free, if yielded to will place her and her property within touch of the very dangers which it is sought in the first place to withdraw her from. Her improvident husband, by the most ordinary persuasion, or by his mere declaration made in her presence, as in the case at bar, could, in spite of her, unless she assumed a hostility, which would endanger the continuance of the marriage relation, waste and dissipate her entire estate, and thus the very purpose which, it seems

to us, stands out the most clearly in the act in question, *i. e.*, to secure her protection in the management and enjoyment of her estate, would be defeated.

In Massachusetts, the married woman's property acts, which existed until 1874, when the legislature expressly forbade husband and wife to contract, provided: "Any woman may, while married, bargain, sell and convey her real and personal property, which may be her sole and separate property, or which may hereafter come to her by descent, devise, bequest or gift of any person, except her husband, and enter into *any contract* in reference to the same, in the same manner as if she were *sole*;" and "any married woman may carry on any trade or business, and perform any labor or services on her own, sole and separate account; and the earnings of any married woman from her trade, business, labors or services shall be her sole and separate property, and may be used and invested by her in her own name; and she may sue and be sued as if *sole* in regard to her trade, business, etc., and her property acquired by her or her trade, etc., may be taken on any execution against her." This act covers every material point of our own, and notably the wife is permitted to make "any contract" in reference to her property; which is all that any person can do. But in *Lord v. Parker*, 3 Allen, 127, it was held that she could not be a partner in a firm where her husband was a partner. Speaking of the statutes, the court said:

"Their legal object is to enable married women to acquire, possess and manage property, without the intervention of a trustee, free from the interference or control, and without liability for the debts, of their husbands. They are in derogation of the common law, and certainly are not to be extended by construction. And we cannot perceive in them any intention to confer upon a married woman the power to make any contract with her husband, or to convey to him any property, or receive any conveyance from him. The power to form a copartnership includes the power to create a community of property, with a joint power of disposal and a mutual liability for the contracts and acts of all the partners. To enter into a partnership in business with her husband would subject her property to his control in a manner hardly consistent with the separation which it is the purpose of the statute to secure, and might subject her to an indefinite liability for his engagements. The property invested in such an enterprise would cease to be her 'sole and separate' property. The power to arrange the terms of such a contract would open a wide door to fraud in relation to the property of the husband. If she could contract with her husband, it would seem to follow that she could sue him and be sued by him. How such suits could be conducted, with the incidents in respect to discovery, the right of parties to testify, and to call the opposite party as a witness, without interfering with the rule as to private communications between the husband and wife, it is not easy to perceive; and the consequences

which would follow in respect to process for the enforcement of rights fixed by a judgment, arrest, imprisonment, charges of fraud, proceedings *in invitum* under the insolvent laws, and the like, are not of a character to be readily reconciled with the marital relation. We cannot suppose that an alteration in the law involving such momentous results, and a change so radical, could have been contemplated by the legislature, without a much more direct and clear manifestation of its will."

[The learned Judge then cites, and comments upon, *Smith v. Gorman*, 41 Maine, 405; *McKeen v. Frost*, 46 Maine, 239; *Artman v. Ferguson*, 73 Mich. 146; *Haas v. Shaw*, 91 Indiana, 384; *Scarlett v. Snodgrass*, 92 Indiana, 262; *Schouler's Husband and Wife*, § 317; 2 *Bishop's Married Women*, § 435; *May v. May*, 9 Nebraska, 16; *Fuller v. Ferguson*, 26 Cal. 547; *Suau v. Caffé*, 122 New York, 308; *Toof v. Brewer* (Mississippi, 1888), 3 Southern Reporter, 571; *Hendricks v. Isaacs*, 117 New York, 411; *Abbott v. Jackson*, 43 Arkansas, 212; *Wells v. Caywood*, 3 Colorado, 489.]

We conclude upon the whole that the better reason as well as authority is with the position that these married women's statutes generally agree on their material points, and that it was not intended thereby that a husband and wife could become partners.

But in our statutes there are one or two provisions which we think make this position clearer than it is, perhaps, in any of the others. Sec. 2397 substantially makes each of them, as to all transactions between them, a trustee for the other. The burden of proof, as between them, is upon the party asserting the good faith. Persons who are free to contract with each other are not subject to such a rule. They stand at arms' length, and unless there is actual fraud the law gives no relief. Again, it would seem that if husband and wife are at liberty to contract with each other with perfect freedom, as strangers, the provisions of § 2416 would have been left out. By that section husband and wife, when they attempt to make any agreement as to the *status* or disposition of the community property, must do so by the execution of an instrument in writing, and under seal, which must be acknowledged and certified, as a deed to real estate. Why so much solemnity with regard to her interest in community property, and such looseness and absolute want of protection with regard to her separate property, which, it is conceded by all, it was the first purpose of this act to secure to her?

The case at bar is, perhaps, as strong an example as experience could produce of the evil effects of such a construction of this statute as is contended for by respondents. The wife held certain real estate which she claims is her separate property — it is all she has. The husband engaged in a mercantile business in a building built by her upon her land, and painted over the door a sign, "J. P. Hayden & Co." He went to Seattle to buy goods for his stock, and his wife went with him. In a certain store where he was about to make

some purchases he was asked who constituted the firm. His answer was: "My wife is the only partner I have." She sat within a few feet of where this was said, and the witness who testified to the statement of Mr. Hayden thought she might have heard what he said. Again, a travelling agent for a firm in San Francisco, who sought to sell Hayden goods, when in the store at Fairhaven, asked a question similar to the one asked in Seattle, and received a similar answer; and on this occasion Mrs. Hayden was sitting at a desk in the view of the two men, and again the testimony was that she might have heard what her husband said. The jury found as a special verdict that these were the only two men to whom any such statement was made, although others were testified to. Yet upon this testimony, and some other of as slight moment, and because, as it is said, the wife remained silent and did not deny what her husband said in her hearing, she was held to be a general partner by "holding out," and a judgment was rendered against her not only for the claims of the two firms to whose representatives her husband had said that she was his partner, but also for the claims of eighteen or twenty other firms, none of whom, with the exception of one or two, pretended to have heard that she was in any wise interested in the business, or that she existed as the wife of J. P. Hayden.

It is clear that to sustain such a judgment would be to render the estate of every married woman wholly unsafe, and all but destroy the most beneficial purpose designed to be subserved by the statute as we understand it.

Judgment reversed, and cause dismissed.

ANDERS, C.J., and HORT, J., concur.

[The concurring opinion of SCOTT, J., is omitted.]

DUNBAR, J. (*dissenting*). I dissent. It seems to me that the decision in this case is another instance (too common in the history of the courts of the United States) of the judicial repeal of a statute. It is not only a fundamental principle of our government, well understood and universally recognized, that the legislative and judicial departments of the government must be kept distinct and separate, but the first warning note sounded by all writers on statutory interpretation is that when the language of a statute is plain and unambiguous, the duty of interpretation by the court does not arise. Sec. 2396 provides that "every married person shall hereafter have the same right and liberty to acquire, hold, enjoy and dispose of every species of property, and to sue and be sued, as if he or she were unmarried." There seems to be nothing ambiguous or doubtful in the language or provisions of this statute, and, applying any and every known rule of interpretation to it, we must conclude that there is no room for construction and that the only duty of the court is to declare it the law, and to decree its enforcement. The real intention of the lawmakers must be gathered from what they say, and where the language is not technical it must be given its ordinary and

popular meaning. The statute provides that "every married person can enjoy and dispose of every species of property as if he or she were unmarried;" is there anything doubtful or ambiguous about that language? Could language be more plain, pointed or incisive? Could the idea of unrestricted enjoyment of one's property be expressed more tersely, plainly and emphatically? There are no provisos, and no exceptions expressed. What right, then, has the court to step in and under the guise of construction, inject a limitation which the legislature did not provide for, and which in effect renders nugatory the law passed by that body? It is an easy but a dangerous thing for courts to wander off in hazy theories and speculations concerning what the legislature meant, and to base their conclusions on the policy or impolicy of the law. This should only be done when the patent ambiguity of the law compels it.

[Omitting a long quotation from Endlich on the Interpretation of Statutes, s. 4.]

And yet the majority, by an argument based on the supposed hardships which would be imposed upon married women, have come to the conclusion that the legislature did not mean what it plainly said. And if the language of § 2396 could possibly be tortured into anything doubtful, § 2406 plainly shows that the legislative intent was to remove all civil disabilities so far as property rights are concerned, when it provides that "contracts may be made by a wife and liabilities incurred, and the same may be enforced by or against her to the same extent and in the same manner as if she were unmarried." The legislature evidently understood the full scope of the law it was enacting and its far-reaching effects, and where in its opinion the limitation was necessary it provided for it, as in the proviso to § 2398 that "nothing in this chapter shall be construed to confer upon the wife any right to vote or hold office, except as otherwise provided by law." Had it intended the law to operate as claimed by the majority it would evidently have incorporated a proviso in § 2406 substantially as follows: "*Provided*, No married woman shall enter into a contract of partnership with her husband." But it is left for the court to enact this proviso by judicial construction, something very near approaching, in my opinion, a judicial enactment.

As showing the danger of leaving the plain provisions of the statutory law, I note the fact that the majority recite at length the provisions of the common law, and draw deductions from its analogies, when the act in question, to avoid the very thing which the court now insists on doing, provides especially in § 2417 that the "rule of common law that statutes in derogation thereof are to be strictly construed has no application to this chapter. This chapter establishes the law of this territory respecting the subject to which it relates, and its provisions and all proceedings under it shall be liberally construed with a view to effect its object." The legislature evidently attempted to emancipate this law from the rule of construc-

tion now insisted upon by the court; and the plain rule of construction provided by the legislature is waved aside by the remark that "it is not to be supposed that the legislature intended or proposed to extend the scope of the act beyond the language used further than the implications naturally flowing therefrom." I think that it is to be presumed that the legislature realized the fact that it was enacting a statute in derogation of the common law, and that it did not want the law hampered by the rule of construction mentioned. It seems to me that the language of § 2417 is also so plain that there is no room for construction. In fact, it seems that if the plain provisions of this law can be argued out of existence, all the laws of the state are at the mercy of judicial construction.

I am unable to see in what way the enactments of § 2397 and § 2416 sustain the theory of the majority. It is perfectly competent for the law to provide who shall be subject to the burden of proof in any given transaction, nor is it by any means a new provision of the law. It is especially a wise provision in this instance and can in no way, that I can perceive, throw any light on the subject discussed.

So far as § 2416 is concerned, there is the very best of reasons why transactions concerning community property should be attended with solemnity and certainty; both parties have an interest in such property, and delicate relations exist which do not exist at all concerning the separate property of either of the spouses. The separate property is more independent, and the fact that the law imposes these solemn protections upon community property and not upon separate property would rather strengthen the idea that the use of separate property was entirely unrestricted. The fact is that for many years the law, in obedience to popular demand, growing out of feudal education, stood *in loco parentis* to woman; she was regarded as not being able to transact business, and had to act under a trustee or guardian. Advancing thought has demanded other legislation, and woman's independence and capability have been recognized by the legislation of different states in different degrees. In this state I think the legislature has seen fit to grant to a married woman an untrammelled control of her separate property. The law presumes that she is capable of protecting her own property, and it is not in my opinion the duty of the court now to assume to stand *in loco parentis* or to sally forth in Quixotic zeal to relieve women from conjugal oppressors or from burdens real or imaginary. It is argued by the majority that the case at bar is an instance of the evil effect of the construction contended for by respondents, because the wife was held to be a partner by "holding out," when the testimony did not justify such a conclusion. This argument, in my opinion, is entirely without force, and will apply equally to nearly every law on the statute books. Juries are continually rendering verdicts, and courts entering judgments, based on inadequate testimony; it is simply a question of fact to be tried as any other question of fact is to be tried.

LANE v. BISHOP & CO.

1893. 65 *Vermont*, 575.¹

Book account against H. W. Bishop and Belle M. Bishop, his wife, as partners, under the firm style of H. W. Bishop & Co. Heard upon the report of an auditor at the February term, 1893, Ross, Ch. J., presiding. Judgment against both defendants, *pro forma*. Belle M. Bishop excepts. The opinion states the case.

E. A. Cook and *Smith & Sloan*, for defendant.

Crane & Alfred and *Dickerman & Young*, for plaintiff.

Ross, Ch. J. This is an action of book account. The defendants, H. W. Bishop and Belle M. Bishop, are husband and wife, and are sued as partners trading under the name of H. W. Bishop & Co. The account was contracted by H. W. Bishop & Co. in the years 1890 and 1891, in running a hotel at Newport. The auditor has found that the defendants in fact were partners in conducting that business; that the defendant Belle M. held herself out, and allowed herself to be held out as a partner in the business; that she had separate property, and the plaintiff sold the goods to the firm relying upon her financial ability to pay for them; and that she personally promised, orally and in writing, to pay for the goods. The only contention is whether, being a married woman and her husband being the other partner, she can be compelled to pay for the goods in this form of action. Before the passage of the laws of 1884 and 1888, in reference to the property rights, capacity and liabilities of married women, it was held, in *Holmes v. Reynolds*, 55 Vt. 39, that where the wife had the capacity to contract she and her husband might bind themselves by a joint contract, Taft, J., saying: "Where the wife has the capacity to contract independently of her husband, he would not be liable by virtue of his marital relation upon contracts entered into by her, but there is no reason why he cannot jointly contract with her in all cases where she has the capacity to contract." Subsequently the law enlarged the capacity of the wife to contract. R. L. 2,324, No. 140 of acts of 1884 and No. 84 of acts of 1888. When the cause of this action arose the statute on this subject read: "A married woman may make contracts with any person other than her husband, and bind herself and her separate property in the same manner as if she was unmarried, and may sue and be sued as to all such contracts made by her, either before or after coverture, without her husband being joined in the action as plaintiff or defendant, and execution may issue against her and be levied on her sole and separate goods, chattels and estate. But this section shall be subject to the limitation that nothing herein contained shall authorize a married woman to become surety for her husband's debts except by way of mortgage duly executed, as now provided by law."

¹ Arguments omitted. — ED.

This provision of the statute has been before this court and received construction in *Reed v. Newcomb*, 59 Vt. 630. It is there said: "This law removes the incapacity of a married woman to contract, and permits her to make contracts in the same manner and to the same extent as a *femme sole*, excepting with her husband, and enforces them.

"The power thus given to her to contract with other persons than her husband is unrestricted, and she may jointly with her husband, or other person, make contracts in all cases where she has legal capacity under that act to contract. No reason of public policy now prevents, under this act, the maintaining an action against the husband and wife upon their joint promise, whether made before or during coverture." In the same case, *Reed v. Sarah F. Newcomb and husband*, 64 Vt. 49, it is held that the husband and wife may be jointly liable and held on debts contracted by the husband in a business carried on by him as her agent, which he holds out to the world as her business, with her knowledge, consent and approval. These decisions are of recent date, and establish that, under the present law as well as heretofore, the husband may be the agent of the wife and bind her in any business transaction in which she could personally bind herself, and that he may become jointly bound with her in any such transaction. It only remains to consider whether, in such a joint transaction, carried on by them as partners, she becomes bound to third parties negotiating with the partnership. It is contended that, inasmuch as the statute does not remove the wife's incapacity to contract with her husband, therefore she cannot enter into legal partnership with him, inasmuch as the partnership implies a contract between the several partners both as to the right of each to represent and bind all in all partnership transactions, and also with respect to the several partners' interest, right and liability in the partnership, as between themselves. It may be conceded, and doubtless it is true, that a legal partnership necessarily involves contractual relations between the several partners. If the contention were with reference to enforcing such relations between the husband and wife, as partners, it is quite plain that the statute has not removed the incapacity of the wife to enter into them with her husband, and at law they could not be enforced. But the question presented is not the enforcement of the partnership contract between the husband and wife. This is not a suit to which the husband is one party and the wife the adverse party, to settle their respective rights in the partnership business which they carried on under the firm name of H. W. Bishop & Co. The wife was fully capacitated to use her property in running a hotel, and to contract with the plaintiff for supplies for that purpose. Her contract with the plaintiff for such supplies would bind her as though unmarried. Nor, as we have seen under the decisions mentioned, would her contract with the plaintiff for such purpose become invalid nor unenforceable, because her husband became jointly liable with her for its performance, nor because he acted as her agent in making the purchases of the plaintiff, as, to some extent, it is found that he did. When acting as her

agent he represented her, and acted by virtue of the power conferred upon her by the statute in giving her capacity to act and bind herself. Neither does conducting business by a husband and wife as partners, in regard to third persons, involve her becoming surety for her husband, which, under the statute, can be accomplished only in the manner specified. With respect to such third persons as well as with respect to the partnership business, each partner is principal. Each and all the partners are interested in the business. If one partner pays the whole of a partnership debt, or if he pays more of such debts than his just proportion, he is entitled to a credit therefor in closing the partnership business, but not because he has paid anything as surety for his co-partners. He has only paid what he has legally bound himself to pay as principal. Hence, in holding that a married woman may, in conducting a partnership business with her husband, bind herself to third parties, and that the obligation may be enforced against her when sued with him as a partner, it is not necessary to enforce any part of the partnership contract between the partners, nor any contract or part of a contract which the statute has left her incapable of entering into. Any other holding would allow a married woman, by conducting a partnership business in which her husband was a secret or open partner, frequently to receive all the benefits to be derived therefrom and escape all the liabilities. If the suit was to settle the partnership business between the defendants and to adjust their rights and liabilities therein, other and different questions would arise which we have not considered.

But as to the plaintiff and his rights, the defendants, though husband and wife, and although sued as partners, are no more than joint debtors, nor will the enforcement of the judgment against them as partners be anything more or other than the enforcement of a joint judgment founded on the joint contract and liability of the defendants. Wherever this question has arisen in regard to the rights and liabilities of married women, the decisions, so far as they have come to our attention, have been in accord with the views we have expressed.

Krouskop v. Sohntz, 51 Wis. 204; *Schofield v. Jones*, 85 Ga. 816; *Parker v. Kane and wife*, 4 Allen, 346; *Basford v. Pearson*, 7 Allen, 506; *Burr v. Swan*, 118 Mass. 588; *Major v. Holmes*, 124 Mass. 108; *Goodnow v. Hill and wife*, 125 Mass. 587; *Reiman v. Hamilton*, 111 Mass. 245; *Noel v. Kinney*, 106 N. Y. 74 (60 Am. Rep. 423). The two cases last named are especially to the point.

[Remainder of opinion omitted.]

Judgment affirmed.

(b) WHEN IMPEACHED AS BEING IN FRAUD OF THE CREDITORS OF EITHER SPOUSE.

WINTER v. WALTER.

1860. 37 *Pennsylvania State*, 155.¹

ERROR to the Common Pleas of Snyder County.

Ejectment by Walter against Winter, tenant of Mrs. Mary Ann Hartman, who was by leave substituted as party defendant.

The premises in 1852 belonged to John Hartman, Jr., the husband of defendant; and were sold in that year by the sheriff to Adams. Adams verbally agreed with Mrs. Hartman to convey to her upon receipt of the amount he had paid at the sheriff's sale. Subsequently to January, 1855, the executor of Adams, acting under a provision in his will, conveyed the premises to Mrs. Hartman.

Walter, who held a judgment against John Hartman Jr., in 1851, had it revived by *scire facias*, and on Nov. 17, 1858, purchased the premises at sheriff's sale, and brought this action to recover the possession as sheriff's vendee of the interest which John Hartman, Jr., had therein.

Upon the trial, the defendant requested an instruction which is stated in the opinion.

Verdict and judgment for plaintiff.

Geo. Hill, G. F. Miller, and Isaac Slenker, for plaintiff in error.

A. G. Simpson, for defendant.

STRONG, J.

The court was requested to charge the jury "that real property purchased by a married woman since the passage of the Act of the 11th of April, 1848, with her separate funds, is not liable for her husband's debts, and, in case an attack is made on such purchase by her husband's creditors, all she is bound to prove in the first instance is, that she had separate funds which were not derived from her husband, and by her so proving, the onus is cast upon the person contesting her ownership to show that it was not purchased with her separate means." This the court refused to affirm, though admitting that property purchased by the wife with her separate means is not liable for her husband's debts. The point and the answer, of course, refer only to purchases made during coverture, and they raise the question whether a deed to the wife, accompanied by proof that she had the means to buy, without more, establishes *prima facie* that she did buy for her own separate interest. Before the act of 1848, the possession of money by the wife was, in contemplation of law, the possession of the

¹ Statement abridged. Part of opinion omitted. — ED.

husband. The money was presumed to be his, and this even though the wife might have had an estate settled to her separate use. Of course, when she used money in the purchase of either real or personal property, the presumption was that she used her husband's money, and the ownership of the thing purchased was vested in him whose money had procured it. The Act of 1848 doubtless made a great change in the marital relations. It secured the property of the wife to her as separate property, took away the husband's interest in and control over her estate, but it did not disturb his interest in his own property, nor annihilate any of the evidences of his title. That which before was evidence of ownership in him, is evidence now. If the possession of the wife was then *primâ facie* the possession of the husband, it must be equally so now. There is indeed, if possible, higher reason than formerly for presuming in the first instance that what the wife has in possession, and what she invests, is the property of her husband. Without such a presumption, the Act of 1848 would open a wide door to the perpetration of fraud upon creditors. The wife would become but a cover for her husband's property, and her possession a battery to repel his creditors.

It is the duty of the courts to protect the community against such a state of things. Accordingly it was held in *Gamber v. Gamber*, 6 Harris, 368, that, in case of a purchase by a wife during coverture, the burden is upon her to prove distinctly that she paid for the thing purchased with funds that were not furnished by the husband. This was followed by *Keeney v. Good*, 9 Harris, 349, where the subject was more fully discussed. In that case it was said that evidence that she purchased amounts to nothing, unless it be accompanied by clear and full proof that she paid for it with her own separate funds — not that she had the means of paying, but that she in fact thus paid. In the absence of such proof, the presumption is a violent one that her husband furnished the means of payment. This was the rule laid down in *Gamber v. Gamber*, and it must be rigidly adhered to. It applies to purchases of real estate as well as personal. The evils to be guarded against are equally great in both cases; and as the ownership of the thing purchased is not dependent upon the form of the title, but follows the ownership of the purchase-money, whether it be realty or personalty can make no possible difference. The rule laid down in *Keeney v. Good*, and *Gamber v. Gamber*, was reasserted in *Bradford's Appeal*, 5 Casey, 513, a case in which the contest was not between the wife and a creditor of the husband, but between her and his next of kin. Other similar cases have followed, and decisions to the same effect have been made down to *Walker v. Reamy*, 12 Casey, 410. The existence of the rule is no longer open to question. It was properly applied to the present case. Here the evidence was direct, dependent on no mere presumption, that about three-quarters of the purchase-money came from the husband, and it appeared that the wife had no separate estate. Most of the money with which she

claimed to have purchased she borrowed years before or a year after the deed was made to her, and not about the time when the purchase-money was paid.

[Omitting remainder of opinion.]

Judgment affirmed.

NORVAL, J., IN STEVENS v. CARSON.

1890. 30 *Nebraska*, 544, pp. 549-551.

NORVAL, J. . . . Upon this question the court instructed the jury, at the request of the defendant in error, as follows :

"3. The jury are instructed that in a contest between the wife and the creditors of her husband, in regard to property transferred to her by him, there is a presumption against her which she must overcome by affirmative proof and prove beyond question.

"4. The jury are instructed that in a contest between the wife and the creditors of her husband, in regard to property transferred to her by him, there is a presumption against her which she must overcome by affirmative proof and prove beyond question the *bona fides* of said sale."

The giving of these instructions is made the basis of the third assignment in the petition in error. These instructions appear to have been copied either from the syllabus in *Aultman, Taylor & Co. v. Obermeyer*, 6 Neb. 260, or from the instructions copied in the opinions in the cases of *Lipscomb v. Lyon*, 19 Id. 511, and *Woodruff v. White*, 25 Id. 745. It is claimed that these instructions held the plaintiff to a greater degree of proof than is required in civil cases. They required the plaintiff, in order to recover, to establish the good faith of the transfer of the property beyond question. The word "question" is synonymous with "doubt." The plaintiff, by the charge of the court, was therefore held to as high degree of proof as is required of the state in a criminal prosecution. It has been repeatedly held by this court in civil cases, that the party holding the affirmative of an issue, is only required to establish it by a preponderance of the evidence. *Patrick v. Leach*, 8 Neb. 538; *Search v. Miller*, 9 id. 27; *Koplekmo et al. v. Hoffman*, 12 id. 95; *Altschuler v. Algaza*, 16 id. 631; *Dunbar v. Briggs*, 18 id. 97.

Where a debtor transfers property to his wife, and such transfer is contested by the creditors of the husband, the presumption is against the *bona fides* of the transaction, and the law places the burden upon the wife to show that the sale was not made to defraud the creditors of the husband. But she is not required to satisfy the jury in such a case beyond question that the sale was an honest one. A preponderance of the evidence is all that is required. This view is in direct line with

the decision of this court in the case of *Thompson v. Loenig*, 13 Neb. 386. We quote from the syllabus: "When property is transferred by husband to his wife after a debt is contracted, as against that debt she must show by a preponderance of the proof that she is a *bona fide* purchaser."

The third and fourth instructions stated the rule too strongly against the wife, and should not have been given to the jury. It follows that *Aultman, Taylor & Co. v. Obermeyer*, *Lipscomb v. Lyon*, and *Woodruff v. White*, are overruled, in so far as those cases hold that the good faith of transactions between husband and wife in relation to the transfer of property from the one to the other, by which creditors are affected, must be established beyond question.

WHEELER v. SELDEN.

1891. 63 *Vermont*, 429.¹

EXCEPTIONS from the City Court of Burlington.

Trover for the conversion of a wagon. Plea, the general issue. Trial by court, Peck, J. Judgment for the plaintiff.

The defendant excepts.

The plaintiff attached the wagon as the property of the husband. While so held by him it was taken from his possession by the defendant acting as the agent of the wife.

The remaining facts appear in the opinion.

L. F. Wilbur and *D. J. Foster*, for defendant.

W. L. Burnap and *J. J. Enright*, for plaintiff.

TYLER, J. The case shows that Arnold and his wife resided in Burlington upon premises owned by the latter; that Arnold was the lessee of a barn situated in another part of the city, in which were kept a sleigh, owned by the wife, and the wagon in controversy, owned by Arnold; that while the property was thus situated they made an exchange by which the sleigh became Arnold's, and the wagon the wife's; the wagon, when not in use, remaining in the barn, as before. Previous to the exchange Arnold had been accustomed to use the wagon in going to and returning from his farm in South Burlington, and for other purposes. Mrs. Arnold also frequently used it after the exchange, as she had done prior thereto. On an occasion when Arnold had the wagon at his farm it was attached by the plaintiff as a deputy sheriff, on a writ in favor of a creditor of Arnold, and while in the officer's possession by virtue of the attachment, it was taken away by the defendant while acting as Mrs. Arnold's agent and upon claim of her title to the property. Judgment was obtained by the creditor against

¹ Arguments omitted. — ED.

Arnold in the suit upon which the attachment was made, and an execution was issued and returned by the plaintiff unsatisfied.

It is conceded that the wife acquired a good title to the wagon as against her husband. As we construe the exceptions the question raised is in relation to her ownership of it as against her husband's creditors. The plaintiff's counsel refer to *Leavitt v. Jones*, 54 Vt. 423, but in that case it was only held that a wife, purchasing personal property with her own money from her husband, can hold it as her separate property, and that her title is only liable to be defeated by her husband's creditors if all the requirements of the law necessary to render the sale and transfer valid as against such creditors are not complied with.

The rule in this state is well understood by the profession, that to render a sale of personal property valid against the vendor's creditors, there must be a change of possession of the property from the vendor to the vendee; that the vendee's possession must be exclusive and apparent. *Weeks v. Prescott*, 53 Vt. 57. Where there is a joint possession by the vendor and the vendee, the property is liable to attachment upon the vendor's debts if a candid observer would be at a loss to determine which of the two has the chief control and possession of it, and in case of doubt, the law resolves the doubt against the party who should make the change of possession open and visible. *Flanagan v. Wood*, 33 Vt. 332. The reason of the rule, which is to prevent fraudulent transfers of property, applies more strongly to transactions between husbands and wives than to those between other persons because of the greater facility for the commission of frauds of this character between the former.

No. 140, Acts of 1884, is cited by the defendant's counsel as affording ground for the claim that there was a sufficient change of possession of this property. That act was designed to enable married women to make contracts the same as if sole, and to protect their personal estate from their husband's creditors. It is true, however, that prior to the passage of this act a husband could make a valid sale of personal property to his wife, and that a married woman could acquire as perfect a title to such property from her husband as she could from a stranger. *Leavitt v. Jones*, *supra*. The act referred to does not prescribe what shall be a sufficient change of possession of property in case of such sale, and it in no wise relaxes or varies the rule above stated.

Judgment affirmed.

COBURN v. STORER.

1891. 67 *New Hampshire*, 86.¹

WRIT of entry, to recover a tract of land in Salem, dated March 21, 1890. The defendants, J. W. Storer and Grace T. Storer, are husband and wife, and were married in 1864. The husband made no defence. The plaintiff claimed title to the land under a levy of executions against J. W. Storer, by which his equity of redemption from his mortgage to one Boardman was sold to the plaintiff. The officer's deed to him was dated December 30, 1889. Mrs. Storer claimed title under a deed from Boardman to her, dated March 26, 1888. The plaintiff contended that the money which Mrs. Storer paid Boardman for his deed to her was her husband's money, and that the transaction was a fraudulent one, made by the defendants to defeat the plaintiff's title.

The evidence tended to show that in 1870 and 1871 Mrs. Storer had withdrawn several hundred dollars from a savings-bank and delivered it to her husband, which with her assent he invested in real estate in Maine. It also appeared that in 1882 she delivered to him other money belonging to her. Both defendants testified that these transactions were regarded by them as loans. But no note or other memorandum of the transactions was made. In 1887 and 1888 J. W. Storer paid to his wife at various times different sums of money, which, it was claimed, was a repayment of the money she had before given him, with interest. This money she paid to Boardman, and also gave him her personal note, in consideration of his deed to her.

Subject to Mrs. Storer's exception, the court instructed the jury that the withdrawal of the money from the bank by Mrs. Storer and the delivery of it to her husband, to be by him invested in the purchase of a home for them in Maine, did not create a debt from the husband to the wife, unless it was the understanding at the time between them that the money was furnished as a loan by her to her husband; that the law does not imply a promise on the part of the husband to repay money so furnished; but it must be proved that there was a contract or understanding between them that it was furnished as a loan.

Verdict for the plaintiff.

Sulloway & Topliff, for Mrs. Storer.

Wiggin & Fernald, for the plaintiff.

Per CURIAM.² The delivery of money without other evidence of the contract between the parties raises no presumption of law that it was intended to be a loan, rather than the payment of a debt, or a gift. Its legal effect would necessarily be very different in different cases, and a legal presumption that it amounted to a loan in a given case would be as likely to defeat as to carry out the intention of the parties.

¹ Statement abridged. — Ed.

² See foot-note on page 80 [67 N. H.]

The intention of the parties, found as a fact from competent evidence, must determine the character of their act. The question is one peculiarly within the province of the jury. *Fall v. Haines*, 65 N. H. 118. Whatever weight the marital relation existing between the defendants might have as evidence upon that question, it does not furnish a legal presumption of a loan, which would not exist if Mrs. Storer had delivered the money to some other person than her husband. While the statute (Gen. Stats., c. 164, s. 13; Gen. Laws, c. 183, s. 12) removed certain common-law disabilities of married women, and authorized them to make contracts generally as if they were unmarried, it did not give them the benefit of a legal inference not applicable to similar transactions between other people.

[Remainder of opinion omitted.]

Judgment on the verdict.

STEADMAN v. WILBUR AND WIFE.

1863. 7 Rhode Island, 481.¹

TRESPASS and ejectment for three lots of land. Plea, the general issue. Trial by jury before AMES, C. J.

Plaintiffs claimed under an execution against Reuben M. Wilbur, the sheriff's deed to them bearing date Jan. 21, 1861. The defendant, Mary H. Wilbur, wife of Reuben M., claimed title under a deed from her husband to Greene, dated Jan. 20, 1860, and a deed from Greene to herself, dated Jan. 21, 1860. Plaintiffs objected that these deeds were without consideration, and hence void as against them as creditors of Reuben. Mary H. Wilbur claimed that she had advanced to her husband, from time to time, out of her separate estate, sums of money sufficient to constitute, in the aggregate, a sufficient consideration of said [indirect] conveyance from her husband to her.

Upon the question, under what circumstances advances made by the wife out of her separate property to her husband might inure as a valuable consideration of his conveyance, through a third person, to her, in the absence of any trustee of her separate property secured by the statute, the Judge instructed the jury, that if the wife made such advances to her husband, for the purpose of assisting him in his business or paying his debts, under a promise on his part, made before or at the time of such advances, to pay or secure them on his property, and the husband did so pay or secure them by a conveyance of his property to her through a third person, such conveyance would, so far as the consideration was concerned, be valid as against the husband's creditors, provided, in case of a conveyance of his property in payment, the property was, in value, no more than fairly adequate thereto; but

¹ Statement abridged. Arguments omitted. — Ed.

that where the wife had given or loaned her property to her husband without such promise made prior to the advance of it, he could not, when insolvent, prefer her by a conveyance, to his other creditors; and further, that in considering the evidence of such promise, the jury had a right to consider, not only the direct evidence thereof, but all those facts and circumstances relating to such advances, if any, from which they might reasonably infer that such advances were made upon the trust and confidence of such promise.

Verdict for defendants. Motion for new trial; plaintiffs alleging error in the above instructions.

Hayes, (*Eames* with him,) for plaintiffs.

Thurston & Ripley, for defendants.

AMES, C. J. No one doubts, at the present day, that a married woman, having separate property, may purchase with it an interest in the property of her husband; and that if the price paid by her be adequate to the value of her purchase, her title will be maintained both at law and in equity. *Lady Arundell v. Phipps*, 10 Ves. 139. Even if the purpose of the purchase was to prevent the sale of the property for the husband's debts, and to retain it in the family on account of its peculiar usefulness to or connection with it, the purpose would not be deemed fraudulent, so that the creditors received a fair equivalent for it. *Ib.* If the title conveyed to the wife were a mere equitable one, resting in executory contract, a court of law could not set it up against a legal title by execution acquired by purchase from a creditor's levy and sale; but where, as in this case, the wife's legal title has been perfected by deed, a court of law would deal, and ought to deal, with the wife's right to purchase, for a fair consideration, from her husband, precisely in the same way that a court of equity would. *Ib.*, and cases to this point in the defendant's brief. If this be so by the general law, how much more in this State, where, by statute, not only the wife's rights to her property are secured against her husband and his creditors, but her legal identity with respect to it, as a person distinct from her husband, is recognized, and her power to act and contract in the disposal of it, in the modes permitted by law, is acknowledged by legislative enactments.

If she may contract with her husband at all for the purchase of his property with hers, it must be, in regard to his creditors, upon the same principles as to *bona fides*, and the giving of equivalent consideration, that any other purchaser might. If she loans him money, it must be with the same right to expect and receive security or repayment out of his estate, and even preference of payment, that any other creditor has; for it cannot be pretended that a debt, which a court of equity recognizes, may not be preferred in payment by the debtor, in a state of the law which, like ours, admits preferences in payment, as well as a debt which is also recognized in a court of law. She cannot, indeed, when her husband becomes insolvent, convert into debts as against his creditors, former deliveries to him of her money or other property, or

permit receipts by him of the income or proceeds of sale of her separate estate, which, at the time of such delivery or receipt, were intended by her as gifts, to assist him in his business, or to pay their common expenses of living; and, considering the relation between them, the law would not, merely from such delivery or receipt, imply a promise on his part to replace or repay, as in case of persons not thus related; but would require more, either in express promise or circumstances, to prove that in these matters they had dealt with each other as debtor and creditor. It is not, however, as supposed, a rule of law, that *at the time* of each delivery or receipt of the separate property of the wife by the husband, the latter must expressly promise to repay the former, or to secure her out of his estate, to constitute the relation of debtor and creditor between them in regard to it. Such a promise, made before such transactions and looking forward to and covering them, would, at law as in common sense, avail as well to prove the character of them, precisely as it would between other parties who were dealing with each other on credit and in confidence.

Nor is it true that an *express* prior promise to secure or repay out of the estate of the husband is requisite, in such a case, to prove that her husband received her separate property as a loan, and was therefore entitled, as against his creditors, thus to secure or repay her. Neither at law, nor in equity, is inferential proof to be rejected upon such a subject, more than upon any other, although, as suggested, what are proper inferences may be modified or altered by the relation between the parties. The amounts received, the times when, the occasions, the application of the amounts, the conduct of the parties at or about the times, their relative condition as to property, the time and circumstances attending the payment or security out of the estate of the husband, and the relative value of what has been received and paid, especially if paid by a conveyance of the husband's property, are all proper sources of inference upon such a question, as they would be upon a similar question between other parties.

The question of indebtedment by the husband to the wife is not dissimilar to the more common one of a father to a child, for services rendered during minority, complicated, as it must be, with the question of emancipation, or whether the parent has freed the child from his control, and "given him his time," as the common expression is. This question too, arising as it usually does, after the death of the parent, and in contest with coheirs or creditors, often becomes a difficult one to adjust, with certainty that entire justice is done to all parties; but who ever heard of excluding from its solution evidence of a circumstantial or inferential character, so wisely regarded, so effectually used, not only as a source, but even as a test of truth?

The danger to the rights of creditors was pressed upon us at the argument of this motion, if we should allow inferences to be considered by a jury, in favor of a wife, who sets up against her husband's creditors a claim to a portion of his property purchased by her during cover-

ture, out of her separate estate. A sufficient reply would be, that we do not sit here to make, but to administer the law; but if this were otherwise, we should as soon exclude the light of the sun from the eyes of jurors, lest when they read a document submitted to them they should see it with distorted vision, as we should exclude from them inferential evidence upon any subject upon which it could elucidate the truth, lest they should draw unfounded inferences. In an especial manner would it be unjust to do so in cases to which husbands and wives were parties, or in which the interests of either were involved. Already they are excluded as witnesses for or against each other in all cases in which either is a party or interested, whilst no other relation excludes a party or interested witness from testifying in a civil cause. If, in addition, they were cut off from all presumptive proof, whatever light it might shed upon their transactions with each other, we know not, considering the privacy of domestic life, to what source of proof they are to look for the protection of their relative rights. We are not so far gone in adoration of the rights of creditors, as to sacrifice to them the rights of everybody else.

The danger of false credit to the husband, if the wife may obtain by secret contract an equity as to his property, which he may prefer to the claims of his other creditors by conveyance to her use, whilst he is the apparent owner, though the property is in the common possession of husband and wife, has also been urged upon us; but this danger was so long ago considered by Lord Eldon, and the rights of the wife as a purchaser, in spite of it, upheld by that learned and discreet Judge, that we dismiss the matter by a reference to his comments upon it. *Lady Arundell v. Phipps*, 10 Ves. 145, 146, 150-152.

Our conclusion is, that the Judge trying this cause instructed the jury quite as favorably to the plaintiffs as the law would permit, and that they at least have no cause to complain of his instructions.

[Remainder of opinion omitted.]

Motion for new trial dismissed.

*Jansen was a creditor of
Lewis subsequent to Lewis
conveyance to his wife*

RAGAN, C., IN JANSEN v. LEWIS.

1897. *Supreme Court of Nebraska*, 72 *Northwestern Reporter*, 861, p. 862.

By an unbroken line of decisions, the doctrine is established in this state that when a conveyance from a husband to a wife, or a wife to a husband, is attacked by his or her creditor, the presumption will be indulged that such conveyance is fraudulent, and the burden rests upon the husband or wife, as the case may be, of showing the good faith of the transaction. See *Carson v. Stevens*, 40 Neb. 112, 58 N. W. 845; *Kirchman v. Corcoran*, 51 Neb. 191, 70 N. W. 916, and

cases there cited. But this presumption is not one of law, for the statute makes the question of fraudulent intent one of fact. See section 20, c. 32, Comp. St. It is merely a rule of evidence as to the burden of proof. But, when the cases just cited speak of a conveyance from a husband to a wife or a wife to a husband being prima facie fraudulent as against creditors, what creditors are referred to? Certainly existing creditors. We know of no case in which this court has ever held that a conveyance from a husband to a wife was prima facie fraudulent as against a subsequent creditor of one of the parties to such conveyance, nor do we think any well-considered case can be found which so holds, but that, when a subsequent creditor attacks a conveyance from a husband to a wife as being fraudulent, the burden is upon him to establish such a fraud. Jansen is a subsequent creditor of John Lewis. At the time he became indebted to Jansen the title to the real estate in controversy was of record in the name of John Lewis' wife, and in order for Jansen to have this conveyance from Lewis to his wife, through Barrett, set aside as fraudulent, the burden is upon Jansen to show that the transaction was in fact fraudulent. We do not doubt that a conveyance from a husband to his wife may be overturned by a subsequent creditor as fraudulent, upon its being established that the conveyance was made with the expectation of contracting the debt on account of which it is sought to set aside the conveyance. But there is nothing of this character in this record, and that subject need not be discussed.

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NANCE v. NANCE.

1887. 84 *Alabama*, 375.¹

APPEAL from Talladega Chancery Court; where the bill was dismissed at a final hearing on pleadings and proof.

By deeds executed in accordance with an ante-nuptial agreement, W. H. Nance conveyed to his wife certain lots of land. Plaintiffs, who are judgment creditors of Nance and were creditors at the time of the execution of the agreement and of the marriage, sought by their bill to condemn the real estate to the satisfaction of their judgments, on the ground that the agreement and conveyances were fraudulent as to the husband's creditors. Further claims are stated in the opinion.

John T. Heflin, for appellants.

Bishop & Whitson and Watts & Son, contra.

CLOPTON, J. [The learned judge held, that the wife acquired, by the conveyances, a valid title to the lots. The opinion then proceeds as follows:]

¹ Statement rewritten. Only part of the case is given. — Ed.

The evidence shows that the husband expended his skill and labor in making valuable erections and improvements on the lots after the marriage, and it is insisted that complainants have a right to condemn to their demands the value of the labor. The bestowment of the labor in improving the separate estate of the wife did not constitute her a debtor to the husband, nor can her separate estate be charged therewith in favor of the husband's creditors. As personal labor is not the subject of compulsory sale for the payment of debts, and as a decree in personam can not, in such case, be rendered against the wife, a court of equity is powerless to appropriate the value of the labor to such purpose. In *Hoot v. Sorrell*, 11 Ala. 386, where this question was considered and decided, it is said: "The labor was not susceptible of seizure and the auxiliary jurisdiction of equity can not operate upon it. When the husband merely expends his personal labor in the improvement of his wife's estate, the estate is not thereby made a debtor to the husband, nor can the creditors charge it with the value of the labor."

Materials furnished in making erections or improvements on the wife's separate real estate, by the husband with his own money, if he is embarrassed, will be regarded a gift in fraud of his creditors, who may make her estate liable therefor. But her estate will not be charged, unless the bill alleges, and the proof shows, that the materials furnished by the husband were, in his hands subject to their claims. If the husband's power of disposition is not restricted as to the creditors, they can not complain, as no wrong is done to them. A creditor can not impeach as fraudulent a sale or voluntary disposition of property, which by statute is exempt from the payment of debts. In a conveyance or other disposition of such property he has no interest, and is not thereby delayed, hindered or defrauded, as he could not have subjected the property if retained by the debtor. At the time the materials were furnished by the husband, personal property to the amount of one thousand dollars was exempt. The duty to select what particular property he will retain as exempt is devolved on the debtor, when he owns personal property exceeding in value the amount exempted, and such selection must be made before there is a sale under legal process. But if he has not property exceeding in value the amount exempted, a selection is not required; in such case, the statute "attaches the exemption as absolutely and unconditionally, as if the particular property was specially designated and declared exempt." — *Alley v. Daniel*, 75 Ala. 403; *Fellows v. Lewis*, 65 Ala. 343. The averments of the bill may be sufficient, but the whole tendency of the evidence is, that at the various times when the materials were furnished, and the engine and other machinery were paid for, partly with the money of the husband, all his personal property, including the money so used, was of less value than one thousand dollars.

Affirmed.

CORNING v. FOWLER.

1868. 24 Iowa, 584.

CREDITOR'S BILL. The amended petition charges, that the husband, Nelson M. Fowler, was indebted to plaintiff and others; that he was insolvent; that he purchased some land (six acres) near Iowa Falls, in Hardin County, taking the title in the name of his wife; that he entered into possession, and made thereon valuable improvements, building a house, stable, etc., all with his own means and for the purpose of defrauding his creditors. The indebtedness is admitted, as also the purchase of the land and the improvements; but it is claimed, that the purchase was made with the wife's money, and that the improvements were made in part, at least, by her. The insolvency is not denied. The answers do deny all fraud and all intention to hinder or delay creditors. Upon the issue joined, the court below after examining the testimony dismissed the petition, and plaintiff appeals.

Shane & McCurtney, for the appellant.

M. W. Anderson and S. P. Vannatta, for the appellees.

WRIGHT, J. That plaintiff is a creditor of the husband; that he obtained a judgment; that it remains unsatisfied; that an execution thereon has been returned *nulla lona*; that he was such creditor prior to the purchase of the land sought to be subjected to the payment of his judgment; that the title is in the name of the wife; that the husband was insolvent at that time; that this was known to the wife, — are facts, which are either admitted or abundantly established by the evidence. That the land was purchased with the means of the wife, though somewhat controverted at the commencement of this litigation, we conclude is not now seriously denied, and we think is fairly shown by the testimony. Indeed, as we understand appellant's argument, he claims that he is entitled to a decree establishing a lien against the land owned by the wife, to the extent of the amount expended by the husband thereon in the way of improvements. We therefore dismiss any question as to the land itself, and confine ourselves to the inquiry whether plaintiff is entitled to the lien to the extent of the improvements, or the money expended by the husband from his own means upon the premises purchased and owned by the wife.

While it is undeniable that the wife had knowledge, that these improvements were being made, and that the husband was expending his own means in and about the same, it is not shown, that there was any fraudulent intent on his part brought to her knowledge, or that she participated in any such purpose. In substance the case is this: The wife owns the land; the husband is in debt; she expends some of her own means in improvements; he a much larger amount; she is guilty of no collusion, has no fraudulent purpose, but has knowledge of the improvements made by him, and makes no objections to his thus

expending his money. Under such circumstances can the creditors enforce a lien against the lands of the wife to the extent of the money thus invested by the husband? It seems to us not.

If the case stood as a voluntary gift or conveyance of property by the husband to the wife, without a consideration valuable in its nature, made for the purpose of defrauding his creditors, equity could well follow such property into the hands of the donee or grantee, although the donee or grantee was in no way privy to the fraud. But this rule can have no application where the husband makes with his own means improvements on the lands of the wife, without any contract that he acquired an interest thereby in the realty, or that she was to be liable or accountable to him for the value thereof. The expenditure was voluntary — not under any contract — and it would place at the disposal of an insolvent and spendthrift husband the entire real property of the wife, if his creditors could follow the means expended by him thus voluntarily thereon, and enforce their claims or liens to the extent of such expenditure. The wife cannot thus, without her consent, be made the trustee of the husband, holding her own lands in trust for the payment of liens in the creation of which she had no part. In a contract, express even between the husband and wife, under which he himself or creditors sought to enforce a lien upon her realty, a court of equity would scrutinize closely its terms, and guard carefully her rights. To recognize the existence of such a lien from the fact that he, while in debt, has added to the value of her lands by expending his means thereon, would be going further than any case brought to our attention, and it seems to us would be most dangerous in practice, and in violation of the rights of the wife, — rights, which equity, because of her dependent relation, has ever made the peculiar object of its care. The cases of *Washburn v. Sproat*, 16 Mass. 449; *Wells v. Banister*, 4 id. 515, will be found to support this view. See also 1 Hill. on Real Property, 54 (2d ed.), and further, *Webster v. Hildreths*, 33 Verm. 457, directly in point. Says ALDIS, J., in that case, “Clearly he, the husband, has no right, legal or equitable, to claim compensation for services so rendered. If so, deeds and settlements for the separate use of the wife would be of but little avail, and husbands would have the power to improve their wives out of their estates. Nor can the creditor have any greater right against the wife’s estate than the husband has. . . . Equity has no jurisdiction to compel men to work for their creditors who may perversely prefer to work for the benefit of their wives and children, and leave honest debts unpaid.” And see further, *Pierce v. Estate of Pierce*, 25 id. 511; *White v. Hildreth*, 32 id. 265.

Affirmed.

CASWELL v. HILL.

1867. 47 *New Hampshire*, 407.¹

APPEAL from decree of the Judge of Probate, upon the settlement of the account of Sarah W. Caswell, as administratrix of the estate of her deceased husband, Asa Caswell. Asa Caswell died in 1864, insolvent. Hill and other creditors claimed to charge the administratrix with a house and stable situated on land owned by her. Said land was purchased by the administratrix shortly before her marriage in 1853, and was conveyed "to her sole and separate use, free from the interference or control of any husband she may have." In 1854 the husband and wife built a house upon this land, and about four years later they built a stable upon the same lot. The house was built in part with money which the wife had at the time of marriage and which the husband never reduced into his possession, and in part with the avails of their joint earnings after marriage. The stable was built from the joint earnings of the two after marriage. None of the debts due to the present contesting creditors were contracted until after the house was completed; but many of these debts were contracted before the stable was built.

Small, for administratrix.

Christie, for creditors.

SARGENT, J.

From these facts, it is claimed by the creditors that here is a resulting trust to the husband, to the amount of the money thus invested by him in these buildings. But a trust of this kind only results when real estate is purchased, and the deed taken to one, when the purchase money paid for it belongs to another. The payment, at the time of the purchase, of the money belonging to another, is a necessary requisite to this species of trust. 4 Kent's Com. 305. Here, there was, then, no resulting trust. Nor could the husband or his creditors hold any part of these buildings, as betterments, for those can only be claimed, where the party making them did so upon land to which he supposed he had a legal title, which was not the case here.

But it is claimed by the creditors that here was a set of buildings, erected mainly by the husband with his own money, upon land of the wife, and that it must have been by her consent, either express or implied, and that the husband would own the buildings, or most of them, as personal property, of which the creditors may avail themselves, either by removing the buildings, or selling the husband's interest in them. But the assent of the wife is not only necessary, that the buildings may be erected on her land, but there must also be an understanding and agreement on her part, that he may remove them or hold an interest in them separate from the ownership of the land. *Haven v. Emery*, 33

¹ Statement abridged from opinion. Part of case omitted. — Ed.

N. H. 68; *Dame v. Dame*, 38 N. H. 429. This, we are satisfied from the evidence, was not the case here.

And the general rule is, that the erection of a building on the land of another, without such special agreement, that it may remain the property of the builder, makes it a part of the realty, and it thereby becomes the property of the owner of the soil. *Milton v. Colby*, 3 Met. 78, 81; *Murphy v. Marland*, 8 Cush. 578; *Ashman v. Williams*, 8 Pick. 404; *Washburn v. Sproat*, 16 Mass. 449.

How far this rule is to be applied in this State, as between husband and wife, and between the creditors of the husband and the wife, has not, that we are aware of, been settled. In Vermont, it would seem that the courts give full operation to the general rule, even as between the wife and the creditors of the husband. *White v. Hildreth*, 32 Vt. 265, and *Webster v. Hildreth*, 33 Vt. 457, where it is held, there being no actual fraud upon creditors designed, that, if a husband improve his wife's land by erecting buildings upon it and otherwise, without any agreement with her, through trustees or otherwise, that his labor and money expended thereon shall vest in him any interest therein, or entitle him to any claim against, or compensation from her property, he gains no right or title thereto, which his creditors can reach by attachment, or by the aid of a court of equity.

But we think that while the statutes are liberal in giving to married women rights and privileges in relation to property much more extensive than formerly, that proper care should be taken that, under color of these provisions, frauds should not be allowed to be perpetrated upon the creditors of the husband. If a husband who is not in debt, sees fit to erect buildings upon his wife's land, with his own money, without any arrangement that he is to retain any interest therein, that may be all well enough as between them. It would in such case be properly considered as an allowance made by him for the benefit of the wife, as in case he bought land and took the deed running to her, *Dickinson v. Davis*, 43 N. H. 647; and as in that case it is said on page 649 that such a transaction, in case no fraud was intended on the part of the husband, would be valid as against a party who was not a creditor at the time it was done; so here we are satisfied that no actual fraud was intended on the part of the husband, and we think that the erection of the house on land of the wife by the husband, mostly with the avails of their joint earnings, after marriage, which would all belong to the husband, *Hoyt v. White*, 46 N. H. 45, may properly be considered as an allowance for the benefit of the wife as against all these creditors, since it appears by the report of the auditor that the debts of all these creditors were contracted after the house was completed. The auditor finds that the wife invested about \$200 of her money, which she earned before marriage, and which the husband had never reduced to his possession, in this house, and that the balance of the house was built by the husband from the joint earnings of the two after marriage. Those creditors cannot, therefore, hold the house.

But it appears from the auditor's report that the stable was not built until some four years after the house was completed, and that the debts of these creditors, many of them at least, were contracted before the stable was built. We think that the husband cannot properly be allowed to use the money of existing creditors, to erect buildings on his wife's land, for the purpose of making her an allowance, but that the creditors should be allowed in some way to follow and obtain the benefit of the husband's money thus invested by him, for the wife's benefit; that any different holding would be opening too wide the door to fraud and collusion, and would be, under color of protecting the rights of married women, adopting a rule that would work great hardship and injustice against the husband's creditors.

We think, therefore, that this appellant must be charged with the value of the stable.

H. who was indebted to T and checks and moneys to his wife were applied to in payment of her real property that it did not appear that he sent the money under agreement with her wife, therefore the wife's property is as to part of rent
TREFETHEN v. LYNAM.

1897. 90 Maine, 376.¹ *He charged to the and of his debt to T.*

In equity. On appeal.

This was an equitable trustee process, under R. S. c. 77, § 6, cl. X, heard in the court below on bill, answers and proofs, and where the bill was dismissed. The plaintiffs appealed to this court.

One of the principal portions of the decree appealed from is as follows :

"That as Mrs. Lynam owned the real estate, she was entitled to its income, and might justly appropriate to herself from her husband's remittances an amount equal to a fair rental of the premises occupied by her husband's family, which were owned by her; and that the amounts remitted to her by her husband have not exceeded the amount expended for the support of his family, and the fair rental of the premises occupied by his family."

Benj. Thompson, for plaintiffs.

J. A. Peters, Jr., for Mrs. Lynam and R. E. Campbell.

EMERY, J. From the documents and the testimony of the various defendants themselves, the following facts appear to be practically undisputed.

In 1859, the defendant, Linda M. Lynam (then Linda M. Clement) was the owner by inheritance from her father of a homestead at Seal Harbor, Mt. Desert, and was living upon it with her mother. In that year she married the defendant, Capt. Eri V. Lynam, and the pair began married life upon this homestead and their home has been upon it ever since. The family has consisted of Mr. and Mrs. Lynam,

¹ Argument omitted. — ED.

their children and Mrs. Lynam's mother. In 1882, the defendant Robert E. Campbell married a daughter of the other two defendants and lived with her upon the same homestead as a member of the family. Capt. Lynam's occupation was that of a master mariner and he was absent most of the time after 1874 upon foreign voyages.

In 1883, Mrs. Lynam and her son-in-law Campbell began the enterprise of building and running a summer hotel on her place. One hotel building was erected and furnished in 1884 and a second one in 1887. The money was raised by notes of Mrs. Lynam and her mother, Mrs. Clement, secured by a mortgage of the homestead. In this way money was borrowed as follows: In 1883, \$4000 at 8 per cent; in 1884, \$6600 at 8 per cent; in 1887, \$1500 at 8 per cent; amounting to \$12,100. In addition to the above, \$2500 were borrowed on note alone at seven per cent in 1887. The business was managed by Campbell for himself and Mrs. Lynam under the name of Lynam & Campbell. Mrs. Lynam and a minor daughter worked in and about the hotel during the season at least. The interest on the loans, aggregating over \$1000 annually, and occasionally small sums upon the principal were paid from year to year up to 1892. A \$1000 payment was made in 1889, and another \$1000 payment in 1893. In 1894, some of the property of Mrs. Lynam was sold to one Cooksey and from the proceeds of that sale the various mortgages were finally paid that year.

During all this time Capt. Lynam was away at sea, coming home at infrequent intervals and for short stops only. From time to time he remitted sums of money to his wife, the different remittances varying in amount from \$50 to \$500. They were usually by draft or cheque. In making these remittances Capt. Lynam gave no directions as to what should be done with the money. He seems to have left its disposition entirely to his wife's discretion. The remittances, with but few if any exceptions, were turned over by Mrs. Lynam to Mr. Campbell and by him deposited in the bank to the credit of Lynam & Campbell, — in the same account with the hotel business. One draft of \$350 was sent direct to Mr. Campbell who deposited it to the same account. The aggregate amount of these remittances is much in dispute. The respondents admit that they averaged \$700 yearly. The plaintiffs claim that they were nearer \$1200 per year. There seems to be no exact account of the amount, and it is to be largely determined by inference from circumstances.

As stated above, nearly all the remittances, whatever the amount, were turned into the funds of Lynam & Campbell. Out of these funds of Lynam & Campbell, were paid the hotel expenses, the interest on the notes, the partial payments upon the principal, and also the family expenses of the Lynam and Campbell families who were living together. No accounts were kept, and both Mrs. Lynam and Mr. Campbell are utterly unable to state the amount expended for either or both families. The two families comprised five persons, Mrs. Lynam,

her mother, and an unmarried minor daughter, with Mr. and Mrs. Campbell. Nor were any accounts kept of the hotel business; but both Mrs. Lynam and Mr. Campbell say there was little or no profit in it. Mrs. Lynam says there was a loss.

At a period about midway between the years 1874 and 1883, Capt. Lynam, with his wife's consent, built a stable on the homestead, expending thereon about \$300 of his own money. He does not claim to have built the stable with his own labor, and as he was away at sea the greater part of the time after his marriage, it is a fair inference that the stable was built out of his money.

But all this while, and as early as 1874, Capt. Lynam was indebted to the plaintiffs in a sum of over \$1500, with interest, which he has never paid any part of and has had no property in his name with which to pay it. This indebtedness (now in the form of a judgment) does not seem to have been known to Mrs. Lynam or Mr. Campbell till 1889.

The plaintiffs now bring this bill in equity in the nature of an equitable trustee process under R. S. c. 77, § 6, cl. X, to reach and apply to their judgment the money of Capt. Lynam thus appropriated or used in the improvement of Mrs. Lynam's property, and in her business enterprise. They claim that they have shown a direct appropriation of their debtor's money to the erection of the stable, which they say ought, in equity at least, to be appropriated to his debts. While they do not claim to have shown any direct appropriation of any specific sum of their debtor's money to the payments on the hotel erections, they do claim they have shown a general appropriation of nearly all his earnings, by the business association of Lynam & Campbell, and their incorporation into the fund from which that concern paid the interest, and some parts at least of the principal of the hotel mortgages. They further claim that having shown this, the burden is on the respondents to show that the debtor's money thus taken was in fact expended for his family's suitable maintenance, and that they have failed to do this and hence should submit to its re-appropriation for his debts.

The justice hearing the cause, in the first instance, did not sustain these claims of the plaintiffs, but dismissed the bill upon the following grounds among others: (1) as to the stable, that it was built without any understanding between Capt. Lynam and his wife as to its ownership, and so became a part of the wife's realty with no legal or equitable title thereto left in him; (2) that Mrs. Lynam was entitled to deduct from her husband's remittances a fair rental for her homestead occupied by their family; (3) that (making the above allowance for rent) it did not appear that any appreciable or ascertainable part of Capt. Lynam's remittances was in fact applied to his wife's property or business. The justice seemed to put on the plaintiffs the burden of showing such specific application. He also seemed to intimate that there was or might be a surplus if the rent were excluded.

On account of the intimacy of the marriage relation the husband and

wife cannot ignore the creditors of either to the extent that two strangers might. A debtor's wife receiving her husband's earnings may entirely consume them in the suitable support of his family including herself, without becoming in any way answerable to his creditors. She has no right, however, as against his prior creditors to appropriate her husband's earnings or income to making investments in her own name either for him or herself,—or to keeping down or paying off encumbrances on or otherwise improving her own property,—or to paying the debts or increasing the profits of her separate business. Nor can she rightfully retain, as against them, the value of permanent additions voluntarily made by him to her property. Outside of the statute exemptions he cannot acquire any property which shall be free from the claims of prior creditors; nor can she acquire such property out of his principal or income. Whenever it appears that she has thus absorbed his money or estate, she can be compelled to account for it by this equitable trustee process. The prior creditor of the husband need not show an actual fraudulent intent on the part of either husband or wife. It is enough for him to show that the wife has acquired some property or value out of her husband's unexempted principal or income. This value thus obtained should be restored by her for the payment of his prior debts, though the husband or his representatives might have no legal or equitable claim to such restoration. The wife may owe a duty of restoration to her husband's prior creditors without owing any such duty to him. These propositions are deducible from the following cases. *Call v. Perkins*, 65 Maine, 446; *Sampson v. Alexander*, 66 Maine, 182; *Robinson v. Clark*, 76 Maine, 494; *Lane v. Lane*, 76 Maine, 526; *Stratton v. Bailey*, 80 Maine, 345; *Merrill v. Jose*, 81 Maine, 22; *Berry v. Berry*, 84 Maine, 541.

I. It is undisputed that Capt. Lynam, while in debt to the plaintiffs and having no visible property of his own, directly expended with his wife's consent some \$300 of his own money in making a permanent, visible, appreciable addition to his wife's estate and to its value,—not merely keeping up the estate, or carrying it on, but adding to it. This addition (stable) became a part of the wife's realty, and Capt. Lynam himself, as found by the justice of the first instance, may have no right in it, or to reimbursement for it.

Under the principles above stated, however, the husband's right is not the test of his prior creditors' right. As to them, neither husband nor wife can erect buildings on her land with his money, and retain the benefit. In the absence of fraudulent intent or active participation upon the part of the wife, it might not be equitable to require her to account for the full sum thus subtracted from her husband's means and appropriated to her property, since the benefit to her estate might not be so much; but she should not retain any benefit, or increment in value of his estate made at the expense of her husband's prior creditors. To turn over to those creditors the benefit or increment, if any, thus obtained would cause her no loss of her own property, but would

simply transmit some part of the husband's property to his creditors, — a most equitable proceeding.

II. It is undisputed that Capt. and Mrs. Lynam and their family lived upon her homestead. It does not appear, however, that there was ever any agreement or understanding between them for the payment of rent by him to her therefor. Without expressing an opinion upon the effect of such an agreement if its existence were shown, it may be safely said that in the absence of that agreement the wife has no right to such rent from the husband. It is true the wife may, at her will, manage and dispose of her own property including her homestead upon which the family live. She may lease it to other parties and recover and retain the rent, but while she occupies it herself with her husband and family she cannot, at least in the absence of any agreement, require the husband to pay to her rent therefor. The relation between them as to such occupancy is that of husband and wife uniting to make a common home. The relation of landlord and tenant is not to be inferred or implied. The occupation is that of both. *Southworth v. Edmonds*, 152 Mass. 203. There are doubtless numberless instances in this country where the husband and wife and family are living upon a homestead owned by the wife; yet no case has been found of a claim made in the courts by the wife against the husband or his estate for the rent, in the absence of an agreement. This circumstance is strong against the validity of such a claim.

If the wife cannot insist on such rent, as against her husband or his estate, it follows that she cannot insist upon it as against his creditors. Her husband's indebtedness does not create for her a new right in his property.

III. A wife simply keeping her own and her husband's home and family need not account to her husband's creditors for any part of his income received by her, so long as it does not appear that she is using any part of it for her separate profit. In this case, however, it does affirmatively appear that the wife with a business associate was engaged in a business for her own profit entirely apart from her husband, and that all or nearly all of her husband's remittances were, in the first instance, turned into this business, to the account of Lynam & Campbell. The support of the families of both was drawn indiscriminately from the funds of the business. This procedure was certainly unjust to her husband's creditors, — this subjecting their debtor's income, not solely to the support of himself and family, but to the risk of a business from which he was in no event to derive any profit or increase of estate. At least, it has put on the wife and her business partner the duty of showing affirmatively that such absorption of her husband's income into her property and business worked no wrong to his creditors, — that an equivalent sum was properly and actually consumed by the husband's family. This they have not done. At the most they only give a guess.

It is urged, at this point, that the justice of the first instance has

found this to be the fact, and that his finding of fact is not to be reversed unless clearly wrong. We do not understand the justice to have found this specific fact. His finding was general, including both law and fact. He seemed to concede that the Lynam family expenses alone, not counting rent, might not have consumed the remittances. He made much account of the rent in arriving at his conclusion.

The lamentable tendency of so many debtors to transfer their means and earnings to their wives' possession or to expend them upon their wives' property, not for the support of the family, but to store them away from the reach of their creditors, renders it necessary for the courts to scrutinize thoroughly, and even with suspicion, any such transaction however innocent it appear on the surface. The wife must not be allowed to absorb the debtor husband's property under the cover of family support. *Robinson v. Clark*, 76 Maine, 494; *Scitz v. Mitchell*, 94 U. S. 580. Applying that scrutiny to this case, we are satisfied that at least fifteen hundred dollars of the debtor husband's earnings have been used in additions and improvements upon the wife's real estate with her consent, by which her estate has been increased in value to that full amount.

The plaintiffs are entitled to judgment and execution for that amount and costs against the debtor husband and the defendant wife, to be applied to their former judgment against the husband. The defendant Campbell does not appear to have any interest in the property, and hence the bill should be dismissed as to him but without costs.

Decree below reversed.

New decree in accordance with this opinion.

ABBEY v. DEYO.

1871. 44 *New York*, 343.

APPEAL from an order of the General Term of the Supreme Court in the third judicial district, affirming a judgment entered upon a verdict in favor of the plaintiff.

This was an action of replevin, brought to recover feed, flour, grain, &c., belonging to the plaintiff and levied on in November, 1861, by execution against the husband of the plaintiff. Upon the first trial the plaintiff was nonsuited. A new trial was granted by the General Term (reported 44 Barb. 374), upon which a verdict was rendered for the plaintiff, and judgment entered thereupon was affirmed by the General Term. The defendant appealed to the Court of Appeals. The facts sufficiently appear in the opinion of the court.

M. Schoonmaker, for the appellant.

S. L. Lawton, for the respondent.

HUNT, C. The plaintiff alleges that she carried on the flour and feed business in the summer of 1861, under the name of Stephen Abbey, agent. Her husband she alleged to be her agent, and that as such he bought and sold and carried on the business for her. It was proved that, in making the purchases at Albany, the husband stated to the vendors that he was the agent of the plaintiff and that the goods were charged to him as agent. JTT aff.

The defendant insists that there was no evidence that the plaintiff had employed or authorized her husband to make the purchases or transact business for her, and that the court should have so instructed the jury.

On this point the proof was that Stephen Abbey professed to act for the plaintiff; the son testified that he knew of his mother being engaged in business, commencing in 1861, and that she purchased goods in Albany; that he was the bookkeeper and saw the bills; that his mother often spoke to him about his remaining at home and remaining in the business; she often spoke to him about being in her employment, and that he had his board and clothes for his services, and that suits in relation to the business were brought in his mother's name.

Mr. Avery testified that he sold goods to the plaintiff in 1861, consisting of flour, corn, and oats; and that Stephen was irresponsible, and had judgments against him, and that he gave the credit to the plaintiff. He identified the goods as a portion of those in question here; and he testified that the plaintiff paid him \$200 on account of the goods purchased of him. This payment was made by the check of "S. Abbey, Agent." He further says that he called on the plaintiff for the money, at the house, when both she and her husband were present, and that he gave the check for \$200. If Mrs. Abbey, the plaintiff, had been sued by the Albany merchants for the price of the goods thus sold to her, and the above evidence had been given to prove the agency, it would have been quite satisfactory. No jury could have failed to find that her husband was her agent in purchasing the goods. In addition to this, it was found that the family consisted of the husband, the wife, who is the present plaintiff, two sons, one of whom was the clerk already mentioned, a daughter and an aunt, all living together, as I infer, near to the place where the business was carried on. There was no contradictory evidence on this point of agency, and I think it warranted the inference that the husband was authorized by the wife to transact the business in question, and at the time of making the purchases.

The act of March, 1860 (Laws 1860, chap. 90, page 157), in its second section, provides as follows: "§ 2. A married woman may bargain, sell, assign and transfer her separate personal property, and carry on any trade or business, and perform any labor or service, on her sole and separate account; and the earnings of any married woman, from her trade, business, labor or services, shall be her sole and separate property, and may be used and invested by her in her own name."

In *Knapp v. Smith*, 27 N. Y. R., 278, Judge DENIO says, that a married woman may cultivate her land and manage her personal property by means of any agency which any other owner of property might employ, and that the produce thereof and the increase of stock would be hers. The agency thus referred to in the case before him was that of her husband.

In *Gage v. Dauchy*, 34 N. Y. 293, it was held that a wife might employ her husband to transact her business, and although no agreement for his compensation was made between them, that the property would not thereby become subject to the payment of his debts.

In *Buckley v. Wells*, 35 N. Y. R. 518, it was decided that a married woman could manage her separate property through the agency of her husband, and was entitled to the profits of a mercantile business, conducted by her husband in her name, when the capital was furnished by her, and he had no interest but that of an agent. It was further held that the application of an indefinite portion of the income to the support of her husband, did not impair the wife's title to the property. While the law does not require the wife to support the husband, it does not prohibit her from doing so; and where the property which is the subject of dispute does not come from him, this circumstance furnishes no evidence of fraud.

In arguing this point the appellant's counsel insists that the services, the time and talents of the husband are valuable, and he has no more right to give them to his wife, as against his creditors, than to give to her his property to their prejudice. The one, he says, is as much their property as the other. This argument is entirely unsound. The property of a debtor, by the laws of all commercial countries, belongs to his creditors. He must be just before he is generous. He must pay before he gives. Not so with his talents and his industry. Whether he has much, or little, or nothing, his first duty is the support of his family. The instinctive impulse of every just man holds this to be the first purpose of his industry. The application of the debtor's property is rigidly directed to the payment of his debts. He cannot transport it to another country, transfer it to his friend, or conceal it from his creditor. Any or all of these things he may do with his industry. He is at liberty to transfer his person to a foreign land. He may bury his talent in the earth, or he may give it to his wife or friend. No law, ancient or modern, of which I am aware, has ever held to the contrary. No country, unless both barbarous and heathen, has ever authorized the sale of the person of a debtor for the satisfaction of his debts.

The judge charged the jury that they were to find whether the plaintiff was in fact carrying on business herself, her husband acting merely as her agent, or whether the business was in fact her husband's and the agency a form or device for carrying on business with his own means and her son's services. If the former, he charged them that the wife could hold the property. If the latter, he charged them that the

property belonged to the creditors and the wife must be defeated. This was the precise question for the jury to decide, and it was clearly and fairly placed before them. Their decision is conclusive here.

[Remainder of opinion omitted; also the concurring opinion of EARL, C.] *Judgment affirmed.*

GLIDDEN v. TAYLOR.

1866. 16 Ohio State, 509.¹

ERROR to District Court of Darke County.

Petition, filed in 1862, by Glidden, Murphin & Co. against John B. Taylor, and Martha D. Taylor, his wife, to subject to the payment of plaintiffs' claims a foundry and machine-shop, and a house and lot. Plaintiffs, in 1857, recovered judgment against John B. Taylor and his partner, Samuel D. Taylor, composing the firm of Taylor & Brother. They allege that the aforesaid property was purchased by John B. Taylor with his own money, but in the name of his wife to, whom he had caused the legal title to be conveyed with intent to hinder and delay his creditors. J. B. Taylor and his wife answered separately, denying plaintiffs' allegations. *over for facts*

Upon the trial, plaintiffs called John B. Taylor as a witness, among others. As his testimony makes the most favorable case for his wife, the decision here, on error, is confined to the case thus made. His testimony shows, substantially, the following facts (*inter alia*):

The firm of Taylor & Brother formerly carried on business in said foundry and machine-shop; and became insolvent in 1854. The firm mortgaged certain personal property (castings, car-wheels, tools, etc.) to Winner & Frizell, to secure a claim of between \$300 and \$400. This mortgage was the first lien. In 1857, the partners confessed judgment in favor of Winner & Frizell upon their claim secured by the above mortgage. Execution was levied on the mortgaged property, and the same was sold by the sheriff to Weston for \$400. Immediately after bidding off the property, Weston told John B. Taylor that he might take it as his (Weston's) agent, and dispose of the same to the best advantage, and pay him (Weston) the \$400, and give the residue of the property to Martha D. Taylor, John B. Taylor's wife. Portions of the property were disposed of by John B. Taylor, and at the end of six months he was able, out of the proceeds, to refund the \$400 to Weston; and by the time it was all disposed of, the additional sum of \$1,200 was realized therefrom. Some part of the \$1,200 was consumed by John B. Taylor's family, as he was in no business for two or three years previous to the sale to Weston, and also for about the same time thereafter.

In April, 1860, John B. Taylor, acting for his wife, purchased in her

¹ Statement abridged Arguments and part of opinion omitted. — Ed.

name the foundry and machine-shop of Aikens, who then owned it. The purchase was made for about \$300, subject to liens thereon amounting to about \$1,000. A part of the liens were subsequently paid out of the proceeds of the business carried on in the name of Martha D. Taylor. The payments made for the foundry and for the liens thereon, except so far as thus derived from the proceeds of the business, were derived from money realized under the aforesaid gift of Weston to Mrs. Taylor.

On the purchase of the foundry property in April, 1860, John B. Taylor, as the agent and trustee of his wife, started business in the machine-shop, and thereafter, to the time of the trial, carried on the business of manufacturing sugar-cane mills and other kinds of machinery, and repairing machinery. The business was carried on in the name of his wife, and with her capital, acquired by her as before stated.

In the prosecution of the business, John B. Taylor, as agent and trustee of his wife, had the entire management, superintendence, and control of the same; he, being a skilled mechanic, worked at the business himself, employed hands, purchased stock, and directed all things connected therewith. His own services were worth \$2 per day. His wife was never the owner of any property of any kind, and had no capital in the business or in the building in which it was conducted, except the profits or proceeds given her by Weston.

There was no formal agreement between Taylor and his wife, as to his services or as to the disposition of the proceeds of the business. As her agent and trustee, he received the proceeds, supported himself and family therewith, spent what money he desired to, and with the surplus, purchased, in the name of his wife, a dwelling-house and lot in Greenville for \$2,580, in January, 1862, subject to an annuity of \$41, charged thereon in lieu of dower, in favor of the widow of Solomon Schlenker. He paid the first and second payments, of \$1,000, each, of the purchase money. The third and last payment, amounting to about \$1,000, remains unpaid.

Out of the further proceeds of the business he improved these premises to the extent of some \$300, by placing in the lot a fountain, flower vases, and other ornaments and improvements, which were principally manufactured at the shop in the prosecution of the business.

Out of the proceeds of the business he purchased, and at the time of trial held, a note for some \$1,600, then worth \$1,200 or \$1,300.

The entire accumulation of the business, since its commencement in 1860, amounted to six or seven thousand dollars above expenses, most of it after the year 1860; not more than \$500 above a living and expenses, was realized in that year.

At the time of the purchase of the foundry property from Aikens it was not valuable, but had become so since. A short time before the purchase of Aikens it had been sold for less than he was to get.

About the time the plaintiffs' attorney was endeavoring to levy an execution issued on their judgment, on the furniture of John B. Taylor,

he executed to Weston a chattel mortgage on the furniture, to secure a debt of \$175 he owed to Weston. The furniture was valuable.

Taylor told his wife, in the commencement of the business, that he would do the best he could, support the family, spend what money he desired, and invest the residue for her benefit, in her name.

The defendants offered no evidence.

The district court found the equities of the case to be with Mrs. Taylor, and that she rightfully, and without fraud as to John B. Taylor's creditors, was the holder and owner of the real estate mentioned, and therefore dismissed the petition.

The plaintiffs moved for a new trial, on the grounds (1) that the court found and adjudged against the weight of the evidence, and (2) erred in dismissing the petition. This motion was overruled and exception taken.

Allen & Corbin, for plaintiffs in error.

Wilson & Knox, for Taylor and Wife.

WHITE, J.

But we are not called upon, in this case, to examine the facts critically, with the view of determining the strict rights of the parties in respect to the money given to Mrs. Taylor.

The only question we have to determine is, whether the court erred in refusing a new trial, and in dismissing the plaintiffs' petition.

For the purposes of this question, we assume the case to be, in the aspect most favorable to Mrs. Taylor, viz: that the money was either her separate property, or, at least, that the husband might, in view of the manner in which it was acquired, and as against existing creditors, lawfully settle it on his wife, for her sole and separate use.

In this view of the case, the first question that arises is, as to the legal character of the transactions by which the real estate in controversy, and which the plaintiffs seek to subject to the payment of their judgment, was acquired.

Can this property be truly said to be the product or result of the investment of the money given to Mrs. Taylor by Mr. Weston?

It seems to us rather that it is the product of the manufacturing business established and carried on by the husband.

In the prosecution of this business, he had its entire management and control. Being skilled in the business, he worked at it himself, employed the hands, purchased stock, and superintended it in all its branches. True, it was carried on in the name of the wife, and Mr. Taylor assumed to be acting only as her "agent and trustee." This is the only feature that distinguishes it from ordinary cases of men carrying on business on their own account.

While courts of equity permit the husband to become trustee or agent of his wife, and, frequently, will charge him with that relation against his will, yet, they have invariably had a scrupulous regard to the rights of creditors, and have been the more scrutinizing, in view of the in-

creased danger to creditors from property arrangements between husband and wife, arising from the peculiar and confidential nature of the marriage relation. Equity penetrates to the substance of a transaction, and is governed by it, not its form. In a proper case, if there be no trustee appointed by the parties, it creates one; and, upon the same principle, if the character of trustee or agent be assumed, in an improper case, equity disregards it.

Disrobing, then, the transactions of all matters of form, and looking at the naked facts, it appears that Mr. Taylor, being skilled in the business, established a manufactory for the manufacture and repair of various kinds of machinery, which was conducted under his sole charge for several years; that under his energetic, skillful, and prudent management, the business was profitable; that after applying so much of the profits as was necessary to keep up the establishment, he applied the remainder to the purchase, in his wife's name, of the real estate described in the petition, and to the purchase of a note of sixteen hundred dollars, said, at the time of the trial, to be worth twelve or thirteen hundred dollars; that the entire accumulations from the business, above expenses, amounted to six or seven thousand dollars; and that in establishing and conducting the business, he had used the money of Mrs. Taylor, his wife.

The foregoing is the substance of the transaction; and the question is whether the title of Mrs. Taylor to the property thus acquired, is, in equity, unimpeachable by the plaintiffs, who are antecedent creditors of the husband?

The property in controversy can, in no just sense, be said to be either the income, increase, or profits of the money given to Mrs. Taylor.

The money was used by the husband in carrying on the business, and from the profits made therefrom the purchases were made; and it is pertinently argued by Mrs. Taylor's counsel that there is no rule in such a case for the division of the profits. The consequence claimed, on her behalf, is that she should hold the whole of the property against the creditors, or, at the furthest, that the creditors should be allowed only what would be fair wages to the husband as an employe of the wife.

In regard to the last part of this claim, it may be remarked that no such relation as employer and employe for wages was stipulated for, or contemplated between, the husband and wife. The testimony of Taylor, himself, is that "he told his wife, in the commencement of the business, that he would do the best he could; support the family, spend what money he desired, and invest the residue for her benefit, in her name." To this, she made no objection; and, in speaking of the manner in which he did act, he says "that he received the proceeds of the business, supported his family and himself therewith, spent what money he desired to, and with the surplus purchased" the property.

It is further to be noted that the difficulty of making a division is in no way attributable to the creditors. They are entitled to have the

property of the husband appropriated to the payment of his debts ; and if the wife authorizes or permits her money to be so mixed with the products of the business and industry of her husband that it cannot be separated, this furnishes no reason why she should gain and the creditors lose thereby.

Without entering into an exposition of the consequences that would follow the adoption of a rule sustaining the present claim of Mrs. Taylor, it is sufficient to say, that we are satisfied that sound public policy, and the settled principles of law and equity alike forbid its adoption ; and that where a wife thus suffers her own money to be employed by her husband, and blended with his earnings so that it cannot be separated, though the business may be conducted in her name, the most favorable attitude she could be allowed to assume, in a controversy with his creditors, is that of a creditor in equity. At law she can, of course, have no standing as a creditor.

The arrangement between the husband and wife, whereby he undertook to carry on business in her name and for her exclusive benefit, was, in effect, an attempt to make a voluntary settlement of the products of his skill and industry in favor of his wife ; and the purchase of the property, and its conveyance to her, was but the carrying out of the arrangement.

The principle of the arrangement would be the same whether it embraced property which he had already acquired, or only his future acquisitions ; and if the arrangement be valid as against creditors for the period of about four years that elapsed from the time of its date to the time of the trial, it may be continued during the joint lives of the parties, if they so elect ; and if the husband should survive the wife, no good reason is perceived why, if he should choose to do so, he might not prolong the arrangement for the benefit of her legal representatives.

It has been uniformly held that a voluntary settlement by an insolvent is void as against antecedent creditors, without regard to the intention with which it was made. Upon this principle the conveyance in question cannot be upheld against the plaintiffs. 2 Bright's Husband and Wife, 111, chap. 2.

The only remaining question, in this aspect of the case, is as to the extent of the equity of the wife in the property. As the plaintiffs are, in equity, seeking to divest her of the title, she is, as against them, entitled to the extent of her right to protection ; and, as we have already remarked, the most favorable position she can claim to occupy is that of a creditor in equity of her husband, and as such entitled to her money and interest.

The judgment will be reversed, and a new trial granted, and the cause remanded for further proceedings.

MAYERS v. KAISER.

1893. 85 Wisconsin, 382.¹

APPEAL from the Circuit Court for Dane County.

Plaintiff is receiver of the property of M. Kaiser, appointed in proceedings supplementary to execution upon a judgment recovered against M. Kaiser by Talcott in 1885. This action is in the nature of a creditor's suit against M. Kaiser, Jennie Kaiser, his wife, Joseph and Julius Kaiser, his sons, and Samuel Spiegel, to reach, and subject to the payment of said judgment certain real estate, the legal title to which is in the wife, and also a stock of goods and business of a store in Madison, called "The Fair," carried on in the wife's name.

The Circuit Court found the facts to be substantially as follows:

In 1885 Kaiser failed in business, in Chicago. Talcott was one of his creditors at that time. Mrs. Kaiser was also a creditor to the amount of \$1500, money which she had at the time of her marriage, and which she had loaned to her husband. The goods of M. Kaiser were sold on three executions, one in favor of Mrs. Kaiser, and two in favor of other creditors. There was no surplus property after these sales. Mrs. Kaiser bought out one of the above execution creditors; and the business was continued in Chicago by Mrs. Kaiser and the other creditor, Kaiser being employed at a salary of \$25 per week. In a short time, the business was removed to Madison. Mrs. Kaiser, soon after that removal, bought out the other execution creditor, and became sole owner of the business, which was thereafter managed by her husband, as her agent, at a salary of \$5 per week. The entire family were supported out of the proceeds of the business. The business was reasonably profitable. From the examination of M. Kaiser and his wife, it appeared that the money which built the houses on the real estate standing in the wife's name came out of the profits of the business. In 1892, Mrs. Kaiser sold the stock of goods to her sons and Spiegel, composing the firm of Kaiser Bros. & Spiegel, receiving \$2100 in cash, and their note for \$500; and they assuming the outstanding indebtedness of the business, amounting to \$2741.63. This sale was made in good faith, for a full consideration, and not for the purpose of hindering or delaying creditors of M. Kaiser.

As a conclusion of law, the Circuit Court found that Mrs. Jennie Kaiser was the absolute owner of the property up to the time of the sale to Kaiser Bros. & Spiegel, when they became and now are the owners thereof; and that none of the property could be subjected to the debts of M. Kaiser.

The action was dismissed; and the plaintiff appealed. *Jaff.*

Bashford, O'Connor, & Polleys, for appellant.

Bushnell, Rogers & Hall, and *H. W. Chynoweth*, for various respondents. *Field.*

¹ Statement abridged. Arguments and part of opinion omitted. — Ed.

PINNEY, J. [Omitting part of opinion.]

2. As the business established at Madison in "The Fair" store was the business of Mrs. Kaiser, as against her husband's creditors, she might lawfully employ her husband, with or without hire, to manage it and assist her in carrying it on. The evidence does not sustain, we think, the charge that what he did in this respect was in pursuance of any plan or scheme to defraud his creditors. The business was not only her own, and transacted in all respects in her own name, but it does not appear that any claim was ever made to the contrary until this proceeding was instituted, nor that she ever made any concession, or her husband any claim, to the contrary, or that he has, during a period of eight or nine years, used any of the proceeds beyond his five dollars per week as his own, or claimed the right to do so. We are unable to say that his employment and management of the business was not in good faith, or that it shows that he was the real owner and the title of his wife was merely nominal or colorable. Mrs. Kaiser had a right to deal with her separate property in all respects as a *feme sole*, and had a right to employ agents to assist her in managing her property and carrying on her business; and she had a right to employ or avail herself of the services of her husband without subjecting her separate estate to the claims of his creditors. "With respect to her separate property the statute has placed her upon the same footing as to all the world, her husband included, as if she were, in the words of the statute, 'a single female.'" *Beard v. Dedolph*, 29 Wis. 140. But she may not enter into partnership with him. *Fuller & Fuller Co. v. McHenry*, 83 Wis. 573. "As a negotiation or dealing, therefore, with respect to her separate estate, the transaction is to be looked upon as if the debtor was not her husband, but a stranger. The marriage relation is to be disregarded, except where the question of fraud arises; and there it will be considered, and the transaction more closely scrutinized, on account of the greater inducements offered and facilities afforded for the commission of fraud." *Beard v. Dedolph*, 29 Wis. 140; *Hoxie v. Price*, 31 Wis. 82; *Abbey v. Deyo*, 44 N. Y. 348; *Gage v. Dauchy*, 34 N. Y. 297.

3. The proposition most strongly pressed at the argument was that the creditors of Kaiser, the husband, were entitled to receive payment of their claims out of the property accumulated, beyond the present needs of his family, by his skill, industry, and ability in managing and conducting the business of "The Fair" as the agent of his wife; and the cases of *Glidden v. Taylor*, 16 Ohio St. 509, and *Feller v. Alden*, 23 Wis. 301, among others, were cited in support of the position. This contention is contrary to the case of *Dayton v. Walsh*, 47 Wis. 113, wherein it was held that where a married woman, having at the time no separate estate, purchased a farm of a stranger entirely upon credit, giving her notes for the price, secured by a mortgage on the property, and her husband lived with her on the farm and controlled the farm labor, carrying on the business in her name and as her agent without

any agreement as to his compensation for such services, the purchase by her having been made in good faith and not as a means of fraudulently placing the husband's property beyond the reach of his creditors, the crops raised on the farm by their *joint* labor and management belonged to the wife, and that they were not subject to sale for the husband's debts. This conclusion was considered to be in accordance with the case of *Feller v. Alden*, 23 Wis. 301, relied on by the appellant. In *Feller v. Alden* it was held that where the wife owned land as her separate estate she might cultivate it by means of the labor of her husband and their minor children, and that the *legal* title to the products and proceeds would be in her, so that they could not be levied upon under an execution against her husband; that the mere fact that the wife employed the husband's services in cultivating her land was not proof of an attempt to defraud his creditors. It was questioned in that case, upon the authority of *Glidden v. Taylor*, 16 Ohio St. 509, whether a court of equity, upon a proper application of the husband's creditors, would not make an apportionment of the products, as between the fair rent and use of the capital of the wife and the value of the personal services of the husband, so as to give the creditors the benefit of his industry, but the question was not decided. The case of *Glidden v. Taylor*, *supra*, is materially different from this case, in respect to the fact that in this the husband had a compensation for his services, and none of his property was used in the business, and none of the profits applied to his use. *Penn. v. Whitehead*, 17 Gratt. 503, seems to hold that in such a case as *Glidden v. Taylor* the wife would not be entitled to any share of the profits. It is stated in some of the text-books, and held by many well-considered cases, that the time, talents, and industry of a debtor are at his own disposal, and that his creditors have no claim thereto; that he may bestow them gratuitously upon whom he will, and upon his wife as well as another, and that he cannot be compelled to labor for the benefit or advantage of his creditors; that while the law does not require the wife to support the husband it does not prohibit her from using her own means for that purpose or for the support of his children. 2 Bish. Mar. Wom. § 453; Kelly, Cont. Mar. Wom. 149; *Abbey v. Deyo*, 44 N. Y. 344; *Gage v. Dauchy*, 34 N. Y. 293; *Buckley v. Wells*, 33 N. Y. 518; *Foster v. Persch*, 68 N. Y. 400; *Third Nat. Bank v. Guenther*, 123 N. Y. 568. In *Spering v. Laughlin*, 113 Pa. St. 209, 213, it was held that, if a married woman's separate right to property is found to exist, her husband may not only act as her agent, but he has the legal right to give his wife his labor and skill in conducting her business, and his creditors cannot sell her property, produced by his labor and skill with her original property. *Baxter v. Maxwell*, 115 Pa. St. 473. The entire question in all such cases would seem to be whether the property and business in question is really that of the wife, or whether it is that of the husband and her claim to it a mere cover to protect it from his creditors. We are unable to understand how the

husband's creditors can be said to be defrauded, when they cannot compel him to labor for their benefit, if he voluntarily bestows on others, or on his wife, that which under the law they cannot reach for the satisfaction of their demands. The cases of *Wortman v. Price*, 47 Ill. 22, and *Wilson v. Loomis*, 55 Ill. 352, while differing in some respects from the present, are not in accord with our own cases or those cited above; and *Hallowell v. Horter*, 35 Pa. St. 375, was a case of confusion of property, and the whole was held liable for the husband's debts. The cases that hold or intimate an opinion that in a court of equity an apportionment of profits or division of property may be had at the suit of the husband's creditors, will be found to rest upon the ground of community or blending of the money or property of the husband, as well as his labor, with the property of the wife in some business venture or enterprise in which there is a common participation in or use of the profits; and we have met with no case in which the bare fact that the time, skill, and labor of the husband devoted to the business of the wife has been held to give rise to such an equity. It is difficult to see how such an equity could arise where the husband has already been paid for his services, as agreed, by the wife. We think that the plaintiff's contention in this respect cannot be sustained.

Judgment affirmed.

TALCOTT v. ARNOLD AND WIFE.

1896. *In Court of Chancery*, 54 *New Jersey Equity*, 570.

1897. *In Court of Errors and Appeals*, 55 *New Jersey Equity*, 519.¹

IN the Court of Chancery. On final hearing, before REED, V. C. Bill in equity, by a judgment creditor of Satterlee Arnold, to reach alleged equitable assets of Satterlee Arnold, and to have them applied to the payment of his judgment.

John B. Vreeland, and *Theodore Little*, for plaintiff.

E. C. Harris, for defendants.

REED, V. C. [Satterlee Arnold failed in business, in 1878. Plaintiff was then a creditor, and has since recovered judgment.]

Satterlee Arnold is an inventor, and his skill has been directed to the invention of improvements upon the sewing machine, for which inventions he has caused a number of patents to be issued. Previous to the failure of the firm, he had caused three patents to be issued to himself; and the title to these patents seems to have been passed over to Mrs. Arnold before the failure. Since the failure, the husband has had three patents issued to himself (in 1881 and 1888), and

¹ Statement abridged from opinion. — Ed.

has assigned them to his wife. He has also caused fourteen patents to be issued to his wife at various times between 1880 and 1888].¹

So far as appears, nothing substantial was realized from these patents until 1882. On April 1st, 1882, an agreement was entered into between Anna M. Arnold, the wife, and the Norfolk and New Brunswick Hosiery Company, by the terms of which agreement she granted to the company the exclusive right to make, use and sell in the United States the patents granted on June 21st, 1870 (No. 104,532); on May 10th, 1881 (No. 241,116); and November 22d, 1881 (No. 249,734), as well as any patent which might thereafter be granted to Satterlee Arnold or to Anna Arnold, for any improvement or invention appertaining to "the anchor stitch seam," or "anchor sewing machine trimming and holding devices," or any invention to make knit underwear with the anchor stitch seam and anchor stitch sewing machine trimming.

The company agreed to pay royalties, which, after January 1st, 1883, would together amount to not less than \$1,000 a month. These royalties have been, since the date of the agreement, all paid.

On April 2d, 1886, another agreement was made, between Anna M. Arnold, of the first part, and Satterlee Arnold, of the second part, and A. G. Jennings & Sons, of the third part.

By this contract Anna M. Arnold granted to A. G. Jennings & Sons the exclusive right in the United States to manufacture and sell gloves and other hand covering made of fabric other than leather, and also the right to license others to do so, under patents numbered 104,532, 241,116, 249,734, 276,484, 278,485, 278,486, 311,558, 313,909, 324,351, 331,106, 331,107, 331,108 and under any patent which might be thereafter issued to Anna M. Arnold in aid of the improvements patented as aforesaid.

The parties of the third part agreed to pay the sum of \$25,000 in money. They also agreed to pay one-half of all the royalties which they should receive from others whom they should license, and they guaranteed for five years that these royalties should not be less than \$3,000 a year.

Out of the royalties received under the first of these agreements the wife has bought and now owns an unencumbered lot of ground in Verona worth \$5,000, and also ten government bonds of \$1,000 each. She also owns a \$1,000 railroad bond. She is also the owner of stock in the Arnold Sewing Machine Company, which stock is of the nominal value of \$75,000, but probably of little real value.

Besides the amounts received from the Norfolk and New Brunswick Hosiery Company, Mr. Satterlee Arnold states that \$50,000 or \$60,000 has been received under the Jennings contract. Indeed, he says that they had spent in their business \$110,000. The proceeds received under the two contracts left after paying the expenses of

¹ The passages in [] are an abridgment of the statements in the opinion as to these facts — ED.

the business and maintaining the defendants' household seems to have been invested in the property already mentioned.

The question presented for solution is whether all these patents assigned to or issued to Mrs. Arnold, and the contracts made in her name, from which she received a consideration in cash, and from which she has received and is entitled to receive royalties, the stock held by her in the Arnold Sewing Machine Company, and the property which has been purchased by the use of the moneys received from the said contract, belong to the wife free from any liability to answer for this debt against her husband. She, of course, insists that the property is hers, and she puts her right to it upon the ground, first, that the assignments made previous to the failure of her husband's firm, in 1879, although the assignments were voluntary, were nevertheless valid, inasmuch as they were not made when he was insolvent, or when he supposed himself upon the verge of insolvency, and that at any rate they were then, and are still, valueless.

In respect to the patents issued to her since 1879, it is secondly insisted that they belong to her by virtue of an agreement made between herself and her husband, by which, in consideration of the sum of \$10,000 advanced by her, or to be advanced by her, she purchased the future products of the inventive ability of her husband, and established a separate business of experimentation and of machine-building, and of selling and leasing the said machines.

In respect to the three patents assigned before 1879, it is impossible to conclude from the testimony that they had in themselves any value; nor is there anything in the testimony to show when the insolvency of the firm of Arnold & Harden was first known to the defendant.

The subsequent inventions seem to have been the source from which the profits derived from the contracts and from the business have been mainly received. In regard to the patents issued to Mrs. Arnold, subsequent to 1879, the point upon which the present inquiry must turn is, whether the transaction of which those assignments were a part was a separate business of the wife. The language of section 4 of the Married Woman's Act (*Rev. p. 637*) is:

"That the wages and earnings of any married woman, acquired or gained by her after the passing of this Act, in any employment, occupation or trade in which she is employed, and which she carries on separately from her husband, and all investments of such wages, earnings, money or property, shall be her sole and separate property, as though she were a single woman."

If the business carried on by the husband in the name of the wife after 1879, can be regarded as her separate business, then by force of this statute all the property invested in it, and all the accretions resulting from its conduct, belong to her. And if the husband in conducting this business was a servant of the wife under a *bona fide* employment, then his services in the business will not subject any portion of such property to the claims of the husband's creditors.

The account given by Mrs. Arnold of the circumstances under which these patents were assigned to her, and the future inventions issued to her, and the property where the business was carried on put in her name, is this: She says that about the time of the failure of her husband in 1879, she received the sum of \$10,000 from the estate of her uncle, Dr. Vedder, of Schenectady. She and her husband were then living at Troy. She says that they entered into an agreement by which he assigned to her the patents issued and to be issued, in consideration that she should pay him \$1,200 a year, and should pay all the shop expenses for the development of these patents, and for all experimenting. She says:

"I was to take all the risks from my private fortune for that purpose, and in consideration of his salary and the amount of this money which I paid out, all these inventions as they became developed through due experimenting and became patented were to be assigned to me."

She says that she thinks that this agreement was put in writing, but she cannot find it.

The husband's account of this arrangement with his wife is substantially the same as hers. He also thinks, but is not sure, that the agreement was put in writing.

I do not think that there was ever any such agreement written and signed by these parties. If it had been executed, that fact would indicate that they were of the opinion that such an agreement was of importance. It is improbable that in such case there would be a doubt in their minds whether it had ever been executed.

Nor do I believe that any single verbal agreement, embodying the points which are now said to have been covered by a written agreement, was entered into.

I have no doubt that the wife received the money mentioned as coming from her deceased uncle's estate. I have no doubt that, with her consent, the money was paid to him as received by her or as needed by him from time to time, and that it went to support the family, including the husband, for two or three years after his insolvency, as well as to pay the shop expenses; but that there was a distinct agreement that he was to receive a certain sum as salary, I do not think is proven. Nor do I find any foundation in the testimony to support the theory that the business which was carried on from 1879 to the present time, ostensibly in the name of the wife, was, in fact, the business of the wife. The theory of the defendants is that he was the servant, she was the master; that all the business was transacted by him as her servant. Now, the entire history of the business from the year 1879 down, is convincing that she let him have her money whenever he wished it, without a question, and that he put all the patents in her name, for the purpose of securing his property to his family in case of business trouble, while, in fact, he retained as complete control over it as if he was its absolute owner.

Every step taken in the business was the offspring of his thought and will alone. In all the transactions it is perfectly obvious that everything was left to him. His wife naturally had but the faintest knowledge of the work in which he was engaged, and exercised no oversight over the conduct of the business.

The bank accounts, it is true, were in her name. It is true also that he drew checks under a power of attorney from her; that the contracts with the Norfolk and New Brunswick Hosiery Company, and with Jennings & Sons, were made in her name; that the property purchased was put in her name; that the property in which the machines were manufactured was in her name. But it seems to me transparent that all this was merely colorable. It was the husband who suggested the agency, who settled the terms of the contracts, who received and deposited the money arising from them, and who spent it, with no expectation, on his part or on her part, that he would ever be called upon to account to her for its receipt or expenditure. He kept no books of account, except of the most meagre and partial kind, of the receipts and the expenses of the business. The wife never asked for an accounting and never expected any, and he knew that she never expected any.

The organization of the Arnold Sewing Machine Company and its operation, are illustrations of his absolute control of affairs. The company was organized in this way: The property in which the husband had conducted his experimentation was in her name. The Arnold Sewing Machine Company was organized, and \$75,000 worth of its stock was given to the wife, ostensibly for this property, which she turned over to the corporation. The rest of the stock seems to have been held by friends of the Arnolds, the husband holding one share. The husband was made president and manager, and is still such. His control of the business of the corporation has been absolute. No meetings of directors seem to have been held. In fact, he cannot tell who the present directors are. He has been the president, the manager, the board of directors, and the whole corporation.

The facts of the case as I have found them, are very much in line with those in *Glidden, Murphin & Co. et al. v. Taylor et al.*, 16 Ohio St. 509. In that case the husband manufactured in the name of his wife for years. There was no formal agreement between the husband and wife concerning his services, or as to the disposition of the property of the business. As her agent and trustee, he received the proceeds and supported himself and his family therewith, and spent what money he desired, and with the surplus purchased, in the name of his wife, a dwelling-house and lot. In the prosecution of the business he had entire control. The property thus accumulated was held to be subject to the claims of his creditors.

But it is strongly insisted that all the property which is now alleged to be equitable assets of the husband is the outcome of his inventive ability, and that he had the right to give his talent to his

wife, without impressing upon the property produced by it, any liability for his own debts. It is said that a man is not the slave of his creditors, and that he is not bound to devote his personal labor or mental ability to the payment of his debts. This statement is undoubtedly true. While there is a moral duty to pay debts, yet there is no method of physical coercion by which the debtor can be compelled by any judicial proceeding to do so. But the question here is, not whether the debtor can be compelled to work for his creditors, but whether if he does put into action his latent ability to earn money, and it produces property, the property can be reached and applied to the payment of his debts. In *Abbey v. Deyo*, 44 N. Y. 344, Mr. Commissioner Ward Hunt, in his opinion, took the ground that the debtor could give his time and his talents to whomsoever he pleased. Therefore it followed that, however great his talents were, if he chose to exercise them for the benefit of his wife, the product was hers.

In *Voorhees v. Bonesteel*, 16 Wall. 31, the supreme court of the United States, on appeal from the circuit court of the eastern district of New York, followed the cases in the State courts in holding that a wife could employ her husband to manage her business, and that the application of a portion of the income of the wife's separate property to the support of the husband would not impair the title of the wife.

In *Aldridge v. Muirhead*, 101 U. S. 397, on appeal from the circuit court for the district of New Jersey, Chief-Justice Waite held that the fact that the husband had rendered services in employing the wife's capital in the purchase of lands would not invalidate her title thereto, if his services were devoted to her separate property. These cases were cited with approval by Vice-Chancellor Van Fleet, in his opinion in *Tresch v. Wertz*, 7 Stew. Eq. 124. The right of a wife to employ her husband in her grocery business, in consideration of his clothes and board, was upheld by Vice Chancellor Bird in *Kutcher v. Williams*, 13 Stew. Eq. 436.

I do not understand, however, that in any case decided in the courts of this State it has been held that the right of a husband to give away the proceeds of his labor or his talents as he pleases, free from the demands of his creditors, has been asserted in the unrestricted language used in the opinion in *Abbey v. Deyo*, *supra*.

It is to be observed that in all the cases so far mentioned the services of the husband were rendered in a separate business, or upon the separate property of the wife.

There is no instance, within my knowledge, where a husband has said to his wife, "I am going to work and I give you my labor and its fruits," that a court has held that the gift of the property creating potentiality of the husband carries to the donee a title to the property created, free from all liability to pay the husband's debts.

As has already been remarked, it is of course true that a court cannot exert any authority over a debtor to make him work with his

hands or his intellect for his creditors; and even when a debtor has turned his ability into value by the exertion of his talent or the exercise of his hands, it is, in a degree, free from liability if the debtor is a husband. Such a debtor undoubtedly possesses the right to labor for the support of his family and the maintenance of his children. This is a duty, and so long as the result of his labor does not exceed an amount sufficient to properly maintain and educate his family in their walk in life, it cannot be reached. *Phillips v. Hall*, 160 Pa. St. 60; *Seay v. Hesse*, 123 Mo. 450; *Bump*, Fraud Conv. ¶ 25.

A husband can render those incidental services which the head of the family generally performs, and can give his wife the benefit of his experience and skill in the transaction of her separate business and in the management of her separate property. *Tresch v. Wertz*, *supra*.

But there is no case in our courts which has upheld the right of the husband to give to his wife unrestrictedly all the profits of his labor or his talent. Instead of upholding the right of the husband to this extent the courts have asserted a different rule. In *National Bank of the Metropolis v. Sprague*, 5 C. E. Gr. 13, Chancellor Runyon held that while a husband had the right to give to his wife her earnings when she carried on her separate business, with his assistance, with her own means and on her own account, yet when the labor and skill of the husband had united with those of the wife, the business would be considered as the husband's and the proceeds would not be protected from his creditors.

So, in *Quidort's Administrator v. Pergeaux*, 3 C. E. Gr. 472, it was held that the husband could not give to his wife his earnings.

It is true that at the date of these decisions paragraph 3 of the present Married Woman's Act (Rev. p. 637) had not been enacted. That section became operative in 1874.

This statute shields all the earnings of the wife, derived from her separate business, from her husband's creditors. Under this statute the relations of the husband and his wife are exactly the same as they were before its enactment, whenever the husband had abandoned, in favor of his wife, all claim to her earnings. In both of the cases cited the husband had done this, so far as he was able. The ability of the husband to confer all the benefit resulting from his labor and skill, was not affected at all by the Act, nor does the Act modify or annul the force of the previous decisions touching that point. Those cases represent the true doctrine. No debtor can obtain a clearance from all the claims of his creditors except by virtue of a bankrupt law, nor can he voluntarily turn over all the proceeds of his labors or his ability by a gift which precedes or follows the accretion of such property, so long as he has creditors.

My conclusions are that the business carried on in the name of Mrs. Arnold was not her separate business but was, in fact, the business of her husband.

The profits derived from it, and the property into which the profits have been put, are liable as equitable assets of the husband, to be applied to the payment of the complainant's judgment.

I am of the opinion, however, that Mrs. Arnold has a superior equitable lien upon all this property as security for the repayment to her of all the money advanced to the husband, together with interest upon it.

One object which Mr. Arnold had in mind, when he caused the patents to be assigned to or issued in the name of the wife, was security to her. This much of the transaction she must have known, although she knew little beyond this.

The case is one where the legal titles held by her should be set aside upon equitable terms, and the wife's equity in the property, to the degree already stated, should be protected.

I will frame the details of the decree on application of the counsel of the complainant, upon notice to the counsel of the defendants.

In the Court of Errors and Appeals, on appeal from the above decree of REED, V. C.

Elwood C. Harris and Charles L. Corbin, for appellants.

John B. Vreeland and Stephen H. Little, for respondent.

DIXON, J. A general statement of the circumstances of this case may be found in the opinion of the learned vice-chancellor, and need not be here repeated.

A fundamental difference exists between the view taken by the vice-chancellor and that taken by this court regarding the central fact in controversy. We believe (although he did not) in the substantial truth of the testimony of Mr. and Mrs. Arnold concerning their agreement made in 1879. They both testify that then, shortly after Mr. Arnold's assignment for the benefit of his creditors, it was agreed that Mrs. Arnold, out of her own means (being a legacy of \$10,000 just before left to her), should furnish all the money required by Mr. Arnold in experimenting for the purpose of devising, developing and perfecting mechanical inventions, and also should pay him a salary of \$1,200 per annum, which he was to devote, as far as necessary, to the support of his family; and that, in consideration thereof, Mr. Arnold should employ his skill and labor for the purpose mentioned, and should cause all his inventions and whatever patents might be issued therefor to become the separate property of Mrs. Arnold. To this testimony there is no contradiction. It is corroborated by their conduct since the time of the alleged making of the bargain; for no doubt exists that Mrs. Arnold employed almost the whole of her private fortune in the manner stipulated, and all the patents secured for Mr. Arnold's inventions were issued or at once assigned to his wife, and have always been treated as hers.

It is true that, in managing the business which this arrangement contemplated, the husband has not been held to such a strict account,

and the wife has not exercised such careful scrutiny, as would be looked for if they had been allied in business only, but, considering their close family relationship, this freedom on the one side and confidence on the other militate scarcely at all against the reality and *bona fides* of their business contract.

The contract itself was one likely to be made under the circumstances, for Mr. Arnold's ability to support his family seems to have depended mainly on his inventive skill, and his insolvency rendered it improbable that he would find any other source than his wife's funds for supplying his pecuniary wants. Nor can any unfairness be charged, at least against Mrs. Arnold. In view of the extreme fallibility of all attempts at mechanical invention, and the actual failure of Mr. Arnold up to that time, it perhaps required the faith of a wife in her husband to subject all one's fortune to the hazard of such an enterprise.

The result of the contract is that seventeen patents stand in Mrs. Arnold's name, of which only two or three seem to have any value; that out of these two or three large sums of money have been received, most of which has, however, been spent in further experimentation, leaving in her hands at present property worth about \$16,000, besides the patents and the contracts made under them.

This being the state of affairs, the question arises whether a court of equity should aid Mr. Arnold's creditor to collect his debt out of Mrs. Arnold's possessions.

The complainant urges that such assistance should be given him for three reasons — *first*, because the contract was made with intent to delay, hinder, or defraud the husband's creditors; *second*, because the parties were incapable of contracting with each other; and *third*, because a person's agreement to assign, in gross, all his future labors as an inventor, or the products of those labors, is invalid.

On the grounds above stated, we believe the contract to have been made *bona fide* for valuable consideration on both sides, and without any improper design. The inability of husband and wife to contract with each other exists at law only; in equity, their contract relating to the wife's separate property is as valid as if the wife were a *feme sole*. *Perkins v. Elliott*, 8 C. E. Gr. 526. The present contract related to Mrs. Arnold's separate estate.

As to the third reason, while the proposition there advanced may be sound (*Aspinwall Company v. Gill*, 32 Fed. Rep. 697; *Joliet Manufacturing Co. v. Dice*, 105 Ill. 649), yet certainly, after the contract has been fully performed by the actual transfer of the patents obtained upon the inventions and the payment of the consideration to the inventor, a court of equity cannot be induced to undo the transaction and take back the patents merely because the contract had not been legally enforceable. At that stage the transaction has become simply a completed sale and delivery of personal property for a valuable consideration previously received, and is in all respects unobjectionable.

The present case, as we regard it, falls directly within the principle very recently applied by this court in *Taylor v. Wands*, 10 Dick. Ch. Rep. 491, that a married woman may invest her separate estate in any legitimate business, and employ her husband as her agent to carry it on for her, without rendering it or the profits of it liable for her husband's debts; the profits of the investment, produced through the purchased labor and skill of the husband, will, like the capital itself, be the separate property of the wife.

The decree of the court below should be reversed and the bill dismissed.

For reversal — THE CHIEF-JUSTICE, DEPUE, DIXON, GARRISON, GUMMERE, LIPPINCOTT, LUDLOW, VAN SYCKEL, BOGERT, DAYTON, HENDRICKSON, NIXON—12.

For affirmance — None.

SECTION X.

Suits between Husband and Wife.¹ — Crimes by One Spouse in reference to Property of the Other.

CROWTHER v. CROWTHER.

1868. 55 Maine, 358.²

APPLETON, C. J. The case comes before us on an agreed statement of facts, and the question presented is whether a wife can maintain a suit against her husband on a note given her by him.

At common law such a suit could not be maintained. By R. S., 1857, c. 61, § 3, the wife is authorized to “prosecute and defend suits at law or in equity for the preservation and protection of her property, as if unmarried, or may do it jointly with her husband.” This section manifestly refers to suits by the wife against third persons and empowers her to maintain an action in her own name or in the joint names of herself and husband, at her election. It does not contemplate a suit by the wife against the husband, nor that he should be arrested and imprisoned at her instance. Such has been the uniform construction of this and similar statutes in this State and in Massachusetts. *Smith v. Gorman*, 41 Maine, 408; *Jackson v. Parks*, 10 Cush. 550; *Ingham v. White*, 4 Allen, 412. If the present statutes do not adequately protect the rights of the wife, it is for the Legislature to make such further provision for their protection as it may deem expedient.

Plaintiff nonsuit.

MINIER v. MINIER.

1870. 4 Lansing (New York Supreme Court), 421.³

PARKER, J. This action, which before the Code would have been called ejectment, is brought by the plaintiff against the defendant, who is her husband, to recover possession of a house and lot in the city of Elmira, together with damages for the wrongful withholding of the same.

¹ The admissibility of husbands and wives as witnesses for or against each other has been regulated in many States by statute. There is considerable diversity in the legislation upon this subject. A summary of the various statutes and a collection of decisions thereunder may be found in 1 Greenleaf on Evidence, 15th ed. § 334, note (a). — Ed.

² Statement and argument omitted. — Ed.

³ Only so much of the case is given as relates to a single point. — Ed.

The issues having been referred by consent of parties, the referee found for the plaintiff, and judgment was entered upon his report, from which the defendant appeals.

The principal question in the case is whether the wife can maintain such action against her husband.

Unless such right is given to her by the statute of 1860, "concerning the rights and liabilities of husband and wife" (Session Laws 1860, chap. 90), as amended in 1862 (Session Laws 1862, chap. 172), it is clear that no such action can be maintained.

Section three of the Act of 1862 provides as follows: "Any married woman may, while married, sue and be sued in all matters having relation to her sole and separate property, or which may hereafter come to her by descent, devise, bequest, purchase, or the gift or grant of any person in the same manner as if she was sole." The terms of this provision are sufficient to warrant the bringing of such a suit both by a wife against her husband, and by a husband against his wife, and I am inclined to think that such a suit is also within the spirit and intent of the Act. In view of the main object of the series of statutes in respect to the property and rights of married women, to wit, the more effectual protection thereof, and in respect to the separate property of the wife, its protection from the "interference and control" of the husband, as expressed in the first section of the Act of 1860, it is both logical and reasonable; I think, to construe the authority given her in section three of the amending Act of 1862, to sue in "*all matters having relation to her sole and separate property . . . as if she were sole,*" as entitling her to bring just such a suit against her husband in relation to her property as she may bring against any other person. I see nothing in the relation between husband and wife any more inconsistent with such a construction than with the right of the wife to sue her husband in equity, as she could do, before the statute. *Dyett v. N. A. Coal Co.*, 20 Wend. 573; *Martin v. Martin*, 1 Coms. 473. And when she has the legal title to real estate which her husband actually occupies exclusively of herself, the proper action for its recovery is not a suit in equity, but an action at law. In regard to the property, the relation of husband and wife does not affect it; as to it the parties are strangers to each other. If any other person than the husband were occupying it, as he did, no doubt would exist as to the propriety of the action brought. Since the husband and wife occupy the same relation to the property as the parties in the case supposed, there can be no good reason for refusing to construe the statute according to its letter, since such construction seems so plainly within its object and intent.

The same section (3) above referred to, also authorizes a married woman to "bring and maintain an action in her own name, for damages, against any person or body corporate, for any injury to her person or character, the same as if she were sole," and then provides that "the money received upon the settlement of any such action, or recovered upon a judgment, shall be her sole and separate property." It has

been decided in this court that under this clause of the statute a married woman cannot maintain an action against her husband for slander, 42 Barb. 642, nor for assault and battery, 44 Barb. 366. There are reasons against construing the statute as authorizing such actions between husband and wife, which do not exist in respect to actions relating to property. Before the statute the damages arising from injuries to the person or character of the wife were to be sued for by the husband and wife, and when recovered belonged to the husband, and this statute was evidently intended to change the law in that respect, and allow the wife to sue for, and recover them for herself. This is shown by the latter clause of the provision above cited, to be the scope and intent thereof, and, inasmuch as the evident object of the provision is thus satisfied, it was well held that it was not intended thereby to open the door to a spirit of litigation between husband and wife so manifestly against public policy, and at war with domestic peace as would be the right then in question. But these reasons do not apply to the case at bar, the action in which seems, as already shown, to be within the intent of the statute, and being only an action at law instead of a suit in equity, which might before have been brought, gives no new opportunity for litigation, is not against public policy, which already allows and provides for suits in regard to property between husband and wife; and is fraught with no such disastrous consequences to domestic peace and concord. Another distinction between the two classes of cases is, that while, in regard to injuries to the person and character of the wife, she is allowed to sue for them as if she were sole, no provision is made by which the husband can maintain an action against the wife for such injuries. This want of mutual right, which right in regard to property exists, is a strong reason for believing that the former rule of law against the right of husband and wife to sue each other for such moneys, was not intended to be interfered with. The decisions above cited upon this question cannot, therefore, be regarded as authorities in favor of the defendant. The terms and spirit of the statutes by which married women are invested with the same rights, in respect to their sole and separate property, as though they were sole, should be carried out by such construction as will make them effectual, by allowing the wife the same remedies against her husband, as, in like cases, would be appropriate against other persons.

[Remainder of opinion omitted.]

Judgment affirmed.

BERDELL v. PARKHURST AND BERDELL.

1879. 26 *New York Supreme Court* (19 *Hun*), 358.¹

COMPLAINT charging defendants with wrongfully taking and converting to their own use property of the plaintiff. *W was one of A's*

At the close of the plaintiff's evidence, the complaint was dismissed as to the defendant, Harriet B. Berdell, because she was the wife of the plaintiff at the time of the alleged conversion and at the time of the commencement of the action; and as to the defendant, Eliza W. Parkhurst, upon the ground that the evidence was insufficient to maintain the action against her. *held. sue W. conversion*

Plaintiff excepted, and appealed.

W. J. Groo, for appellant.

S. W. Fullerton, for respondents.

BARNARD, P. J. The plaintiff, at the time of the taking of the property in question, was the husband of the defendant, Harriet B. Berdell. She left her husband's house and took with her therefrom certain personal property of very considerable value. The plaintiff brought this action to recover its value against six persons. The action failed as to four, by consent of the plaintiff upon the trial. The court dismissed the complaint as to the defendant Parkhurst, because there was no proof making out a cause of action against her, and as to the defendant Berdell, because the action would not lie against the wife for the wrongful taking. As to Mrs. Parkhurst, I think the ruling was right.

[The opinion on this point is omitted.]

As to the other questions presented by this appeal, the law is in a very unsatisfactory state. The plaintiff is entitled to own property, and so is his wife. He can bring an action for a conversion against any one who violates his right to have and possess his own property, unless his wife be a person excepted by the relation of husband and wife. She has the same right of action against all trespassers, unless her husband be the sole exception. It has been decided that a wife may not sue her husband for slander, nor for assault and battery, nor for wages. (*Freethy v. Freethy*, 42 Barb. 642; *Longendyke v. Longendyke*, 44 Id. 366; *Perkins v. Perkins*, 62 Id. 530; *Shuttleworth v. Winter*, 55 N. Y. 625.) The Court of Appeals held that a wife did not become liable to answer her husband's administrators for the proceeds of property disposed of by the wife, without right in the life-time of her husband, when the property was intrusted to the wife, by the husband, for management and control. On the other hand, it has been held, that a wife could sue the husband for a conversion of her property. Some question is made, whether an action at law could be brought, but there is no doubt that a complaint which stated a conversion stated a cause of action, and that the proper relief should be given, even though it was not asked for in

¹ Statement abridged. Part of opinion omitted. — ED.

the complaint. (*Whitney v. Whitney*, 3 Abb. [N. S.] 350.) This court has in a late case decided that a wife may sue her husband in ejectment to recover the possession of her property, which was wrongfully detained from her by her husband.

We upheld the action upon the ground that whoever owned property and was entitled to its possession, could recover it at law against any wrongdoer, including her husband. The same principle should govern this case. The evidence showed more than a mismanagement of property intrusted to the wife by the husband. It showed a tortious taking, — a forcible seizure and carrying away under a claim that she owned it and that the husband did not. If he cannot challenge her act in a court of law and recover his property, if it shall be adjudged to be his property, he has not perfect protection, in the enjoyment of his property under the law. We deem his right of action to be clear against his wife, if she has wrongfully taken his property under a claim that it is her separate estate.

Judgment affirmed as to Eliza W. Parkhurst; reversed as to Harriet B. Berdell, and new trial granted as to her, costs to abide event.

PETERS v. PETERS.

1875. 42 Iowa, 182.¹

PETITION, by wife against husband, claiming damages for eleven distinct assaults and batteries.

A demurrer was sustained by the District Court; plaintiff appealed.

Griffin, Crosby, & Carr, for appellant.

Peters & Heath and *A. S. Blair*, for appellee.

DAY, J. If this action can be maintained, it is because of the provisions of our statute.

Whilst it must be admitted that very radical changes have been made in the relation of husband and wife, still it seems to us that these changes do not yet reach the extent of allowing either husband or wife to sue the other for a personal injury committed during coverture.

The sections of the Code mainly relied upon by appellant for the accomplishment of the results which, it is claimed, have been effected, are 2204 and 2211.

Section 2211 is as follows: "A wife may receive the wages of her personal labor and maintain an action therefor in her own name, and hold the same in her own right; and she may prosecute and defend all actions at law or in equity, for the preservation and protection of her rights and property, as if unmarried."

The following is section 2204: "Should either the husband or wife

¹ Statement abridged. Arguments omitted. — Ed.

obtain possession or control of property belonging to the other, either before or after marriage, the owner of the property may maintain an action therefor, or for any right growing out of the same, in the same manner and extent as if they were unmarried."

It is evident that section 2211 refers to and authorizes actions against parties other than the husband; for if this section allows an action generally against the husband, it covers and embraces more than is included in section 2204, and that section is rendered useless and meaningless. Whatever right of action exists against the husband must, therefore, be found in section 2204. This section is limited to actions for property or rights growing out of the same. But in this connection appellant cites *Musselman v. Galligher*, 32 Iowa, 383, which approves *Chicago, Burlington, & Quincy R. Co. v. Dunn*, 52 Ill. 260, holding that a right to sue for an injury is property, and that where this right of action exists in favor of the wife, it is her property for which she may sue. It is claimed that, from this decision and the section above quoted, the right to maintain this action necessarily follows. But it is quite evident that this course of reasoning assumes the very thing to be established. Section 2204 authorizes the wife to maintain an action against her husband for the recovery of her property; and *Musselman v. Galligher* recognizes the doctrine that when a right to sue for an injury exists, that right is property. Before any conclusion favorable to the appellant can be drawn from these premises, the right of the wife to maintain an action against the husband for a tort must be either admitted or assumed. In other words, the argument involves the admission or assumption of the thing undertaken to be proved. The argument, fully expressed, is as follows: The wife may sue the husband for her property; when a right exists to sue for a tort, that right is property; the right of the wife to sue the husband for a tort exists; therefore the wife may maintain an action against the husband for a tort; or, the wife may sue the husband for a tort, because the wife has a right to sue the husband for a tort.

We are satisfied that the statute contains no provisions which authorize this action, and that the demurrer was properly sustained.

Affirmed.

THERESE SCHULTZ, RESPONDENT, v. THEODORE SCHULTZ,
APPELLANT.

1882. 34 *New York Supreme Court* (27 Hun), 26.

APPEAL from an order made at Special Term denying a motion to vacate an order of arrest.

Benno Loewy, for the appellant.

L. Ansbacher, for the respondent.

BRADY, J. This is an action for assault and battery ; the parties are husband and wife. There is no doubt that the papers presented upon the motion contain a sufficient statement of the cause of action ; and the question is, therefore, whether the defendant, being the husband of the plaintiff, can be arrested and held to bail in such an action as this.

The Code (sec. 549, sub. 2) authorizes the commencement of an action to recover damages for a personal injury, and the granting of an order of arrest therein generally, containing no provision as to the suitor who asks for the remedy. It presents nothing, therefore, upon the question suggested. There is nothing either contained in the acts of 1848 and 1849 in relation to married women (see Laws of those years ; chap. 200 of 1848 and chap. 375 of 1849) bearing upon the subject here to be discussed.

In 1860, however, an act was passed by the legislature (see Laws of that year, chap. 90) which seems to be an independent act, having no relation whatever to the acts of 1848, 1849.

It was provided by section 7 as follows :

“ And any married woman may bring and maintain an action in her own name for damages, against any person or body corporate, for any injury to her person or character, the same as if she were sole.”

That section was amended by an act passed in 1862 (see Laws of that year, chap. 172), but not in respect to the provision relating to her right to bring an action, as provided by the act of 1860.

These acts in express terms, therefore, conferred the right and they were acts that treated of the property and rights of a married woman as if a *feme sole* and unmarried, to maintain an action against any person for any injury to her person or character. And it was declared in both acts that the money received upon the settlement of any such action should be her sole and separate property.

There are some adjudications which are supposed to have interpreted the intention of the legislature in regard to the effect of the provision referred to in the statutes of 1860 and 1862, which are not in harmony.

In the case of *Freethy v. Freethy* (reported in 42 Barb. 641), it was decided that a wife could not maintain an action against her husband to recover damages for slander uttered by him, and it was declared that the legislature did not intend by the laws of 1862, to which reference has been made, to change the common law rule as to the disability of husband and wife to sue each other at law. It was admitted in that case that the words “ any person ” in the acts of 1860 and 1862, were very comprehensive, and might, in a proper case, be held to include a husband ; but it was said that the question was “ whether in view of all that the act contains, and of all the surrounding circumstances, we can infer that the legislature intended that a wife might bring such an action,” and further, “ if the words used necessarily included the husband, we should not be at liberty to say that they were inoperative.” But the court said, “ they do not, and it is our duty to

ascertain, if we can, whether the legislature meant to include suits against him."

This is a very well considered case, but it is supposed that the devotion to the rigorous rule of the common law governing the relation of husband and wife, controlled the learned justice, and influenced his decision. He is not the only learned writer who has yielded to the influence of that same emotion and thus circumscribed the objects and purport of the acts of 1848, 1849, 1860, and 1862.

In the case of *Longendyke v. Longendyke* (reported in 44 Barb. 366) it was held that a married woman could not sue her husband in an action for assault and battery. The learned justice delivering the opinion in that case commenced by saying that it was conceded by counsel that by the rules of the common law husband and wife could not sue each other in a civil action, and that the question presented was whether that right had been conferred by the statutes of 1860 and 1862, to which reference has been made. It was said also in that case that the right to sue the husband in an action for assault and battery might, perhaps, be covered under the literal language of the section, but the learned justice said that he thought that such was not the meaning and intention of the legislature and should not be the construction given to the act for certain reasons which he assigned, one of which was that it was contrary to the policy of the law and destructive of that conjugal union and tranquillity which it has always been the object of the law to guard and protect. And he said that the act of 1862 conferred the power to sue and be sued in somewhat broader terms than those contained in the act of 1860, but not in a manner, he thought, to lead to the implication that the husband was intended to be permitted to be sued by the wife for injuries to her person and character as in an action for assault and battery or slander.

It is not regarded as discourteous to say that the ill treatment of the wife by the husband, which consists in the violence of an assault and battery, is more destructive to conjugal union and tranquillity than the declaration of a right in the wife to maintain an action against her husband for an assault and battery upon her would be. It is not at all unlikely that it would operate as a restraint upon militant husbands disposed to indulge in such evidence of conjugal union and tranquillity.

No husband, either by the laws of God or man in any civilized community, has the right to abuse his wife, although it was, perhaps, recognized in earlier times as a principle of the Saxon law and was as contemptible as it was barbarous. But that view no longer prevails. If the husband be disposed to indulge in violence against his wife he should be restrained by all the rules designed to prevent brutality. This class are the only persons who would be affected by the enunciation of the right of a wife to maintain such an action. Men who have no kindred propensities would not fail to recognize the rule as a just one. It would be a condemnation of barbarous acts as well as an expression of the right to indemnity for their commission.

In the case of *Perkins v. Perkins* (reported in 62 Barb. 531) it was declared that a husband could not maintain an action at law against his wife to recover pay for services rendered, any more than he could before the acts under consideration were passed. The learned justice who delivered the opinion in that case exhibited his devotion to the common law doctrine which prevailed in this State prior to the passage of the acts mentioned. He said that at common law the husband and wife by marriage became one person. The very being or legal existence of a woman was by the common law suspended during the marriage, or at least was incorporated and consolidated into that of the husband under whose wing and protection she performs every act.

It may not be improper to say that she could not derive any particular benefit from being under the wing and protection of a husband who commits an assault and battery upon her.

It may possibly be that the husband in performing such an act designs to exercise in anticipation all the privileges that might be assumed by any man over a woman, and by committing it, to anticipate as well a similar act by any other person, and from the proud conscientiousness of being the absolute possessor of the woman, to whom he was united by the marriage tie. It may possibly be that the incorporation and consolidation spoken of is of such a character that any husband beating his wife must necessarily beat himself. This is certainly a logical result.

These statutes, it was also declared, were in derogation of the common law, and were to be construed with reference to that law as it existed when they were passed. The answer to this is, that the object of these statutes was to invade the common law and dispel it, which they have successfully done. If the common law was to be preserved, then it was not necessary to pass any statutes in reference to the subject. The statutes were presumably intended to overcome in many respects the disability which the common law had created and to remove the impediments by which married women were surrounded and their rights subverted. The learned justice admitted that the statute of 1862 conferred in general terms upon a married woman the power to sue and be sued in all matters having reference to her sole and separate property, and also to recover damages for injuries to her person, which damages, he stated prior to the passage of the act, belonged to her husband. Then giving evidence of the influence upon his mind of the rules of the common law to which he so frequently refers, he concluded by saying that until the highest court of review should determine otherwise, he felt bound to hold that the unity of person created by the marriage contract between the husband and wife had been no farther severed than the statutes in express terms, or by necessary implication, had effected that purpose.

It is respectfully insisted that the statute of 1862 conferred in express terms the right to maintain an action against any person for a personal injury, and by implication, if implication were necessary to be

invoked, against her husband, who has no more right to beat her than a stranger. The marriage tie conferred no such power, no such right and no such privilege. It is, on the contrary, founded, or supposed to be, if not in fact, upon the proposition of love and affection, which would not only repudiate, but look with abhorrence upon any such treatment.

[The learned judge here referred to *Berdell v. Parkhurst*, ante, p. 645.]

In the case of *Jamieson*, reported in the 11th of Hun (page 38), and decided in this district and in this court, it was held that in an action by a wife for a limited divorce on account of cruel and inhuman treatment by her husband, an order of arrest could be maintained under section 179 of the Code, and there is no substantial difference between that section and section 549 of the Code of Civil Procedure, to which reference has been made. They both provide for orders of arrest in actions for a personal injury.

The learned justice who delivered the opinion in that case said, that the relief in the action must be strictly equitable, but that there was nothing inconsistent between that fact and the fact that the action was for an injury to the person. That the cause of action as alleged and as required by the statute relating to divorces of the kind sought, sprang out of direct personal injury by the husband of his wife, which must be of such a character as to prove cruel and inhuman treatment, or such conduct on his part as to render it unsafe and improper for her to cohabit with him, and further, that upon the facts alleged, the acts of the husband were in part criminal assaults and batteries, frequently repeated, and which inflicted serious repeated injuries upon the person of the plaintiff, which injuries gave her the right of action for the remedy which she pursued, and that her cause of action might be properly described in the language of the Code as one of pure injury to the person. If so, the right of arrest against the defendant was given by section 179 of the Code, on showing that the cause of action existed in the manner described.

This case, therefore, decides that in an action equitable in its character resort might be had to a provision relating to actions at law for an injury to the person to secure the application of a provisional remedy, namely, the right to arrest; and as the right to arrest is predicated in that case, of the assaults and batteries committed, and which could not be resorted to except in an action relating to them, no difference in principle is discovered between that action and the present except in the prayer for judgment.

In an action for limited divorce the plaintiff, if successful, would obtain a decree of separation and also a money judgment directing the support and maintenance of the wife. The court would in such a case order the payment of a sum of money for the support and maintenance of the wife unless there was some special circumstance in the case which would prevent such a decree.

The legislature did not fail in the laws passed in 1848 and 1849 to exclude the husband from transactions with which it was deemed just or proper he should not be connected, and it was accordingly provided that any married woman might take by gift, grant, devise or bequest from any person other than her husband and hold to her own use, etc. If the words "other than her husband" had not been inserted the act would have authorized the gift or grant from the husband directly, and this was foreseen and prevented because it was not then so intended.

In the act of 1860 (*supra*), by the seventh section, the right was given to any married woman to sue and to be sued on all matters having relation to her property which might be her sole and separate property, or which might thereafter come to her by descent, devise, bequest, or the gift of any person except her husband, in the same manner as if she were sole, but in the amendatory act of 1862 (*supra*) the words "except her husband" were omitted, thus revoking all restrictions and giving a right unlimited. These features of legislation in the State on the subject of a married woman's disabilities arising from the strict rules of the common law are referred to only for the purpose of showing that when the husband was to be excepted from the provisions expressed it was so declared. The legislature, therefore, proclaimed its own intention in its own form. Nothing of this kind was done in conferring upon a married woman the right to sue and be sued, and if any argument is to be indulged on the question of intention then the result is in favor of the proposition that the husband was not to enjoy immunity from arrest in any action the wife might bring against him in which the right to arrest was allowed.

But without pursuing this subject further, it is considered quite sufficient to say that the language of the statute is, as conceded by some of the learned judges to whose opinions reference has been made, quite comprehensive enough to include the husband as one of the persons against whom the wife may bring an action for an assault and battery, and who has been relieved from liability under the language of the statute only by judicial resort to what is declared to have been the intention of the legislature on the subject. To allow the right in an action of this character, in accordance with the language of the statute, would be to promote greater harmony by enlarging the rights of married women, and increasing the obligations of husbands, by affording greater protection to the former, and by enforcing greater restraint upon the latter in the indulgence of their evil passions. The declaration of such a rule is not against the policy of the law. It is in harmony with it, and calculated to preserve peace, and in a great measure prevent barbarous acts, acts of cruelty, regarded by mankind as inexcusable, contemptible, detestable.

It is neither too early nor too late to promulgate the doctrine that if a husband commits an assault and battery upon his wife, he may be held responsible, civilly and criminally, for the act, which is not only committed in violation of the laws of God and man, but in direct

antagonism to the contract of marriage, its obligations, duties, responsibilities, and the very basis on which it rests. The rules of the common law on this subject have been dispelled, routed, and justly so, by the acts of 1860 and 1862. They are things of the past, which have succumbed to more liberal and more just views, like many other doctrines of the common law which could not stand the scrutiny and analysis of modern civilization. They have gone to that bourne from which no traveller returns, where they must rest forever, undistinguished by a single tear shed over their departure.

The order appealed from should therefore be affirmed, with ten dollars costs and disbursements.

DANIELS, J., concurred.

DAVIS, P. J. (dissenting). Several authorities cited by my learned brother BRADY, show that it has been adjudicated by the Supreme Court of this State, that actions of assault and battery and of slander cannot be brought by a wife against her husband. Those adjudications necessarily involved the construction of the statute under which the right to bring such an action is now claimed.

I think they should be accepted by us (after they have stood unreversed for so many years) until the question is otherwise decided by the court of last resort.

There was nothing in conflict with those decisions in holding as this court did, that in an equitable action for limited divorce on the ground of cruel and inhuman treatment, rendering it unsafe for the wife to live with the husband, he could, on a proper case shown, be arrested and held to abide the judgment, because the nature of the action was one for injury to the person.

The order of arrest in such case was in lieu of the old writ of *ne exeat*, by which the court of Chancery held the husband to await its judgment within the jurisdiction of the court.

I heartily concur in the unbounded detestation of wife beaters which my brother BRADY has so forcibly expressed; and I think the legislature might well provide a carefully prepared statute giving direct personal remedies by suit in such cases.

But the court has decided that that has not yet been done, and the doctrine *stare decisis* requires us to leave to the Court of Appeals, or to the legislature, the gallant duty of setting the law free to redress, by civil actions, all the domestic disputes of husband and wife, whether committed by unbridled tongues or angry blows. Their rights, however, to such redress ought I think to be mutual; and to have due regard to the fact that many acts, words and things which would be assaults and batteries and slanders, between other persons have no such character between husbands and wives. And perhaps some provision should be made for reasonable opportunities for the restoration of domestic peace by amicable settlements free from the liens of litigious attorneys. I must, therefore, in the present state of things, dissent from the conclusion of my brethren.

Order affirmed, with costs and disbursements.

In the Court of Appeals, the above decision was reversed.

"Agree to reverse order and to dismiss complaint. No opinion.

"All concur, except DANFORTH, J., who reads for affirmance, and FINCH, J., who concurs therein.

"Ordered accordingly."

89 New York, 644.¹

BEASLEY v. STATE.

1894. 138 *Indiana*, 552.

FROM the Pike Circuit Court.

E. A. Ely and *S. G. Davenport*, for appellant.

A. G. Smith, Attorney-General, *W. E. Cox*, Prosecuting Attorney, and *A. J. Beveridge*, for State.

DAILEY, J. In this case the appellant, Alfred D. Beasley, was charged, by indictment, with the larceny of two hundred and sixty-five dollars in money, and one watch of the value of twenty-five dollars, of the goods and chattels of Ena C. Beasley, who was then his wife. The appellant moved to quash the indictment, which motion was overruled by the court, and exceptions were properly reserved by him. There was a trial by the court, and finding of guilty, and his punishment assessed at imprisonment in the State prison for six years, and a fine of five dollars.

The appellant moved for a new trial and filed his written reasons therefor, which was overruled by the court and excepted to by him.

¹ In *Abbe v. Abbe*, 1897, 22 New York Appellate Division, 483, HATCH, J., said: "The action is brought by a wife against her husband to recover damages for an assault and battery committed by the husband upon the wife. It is settled by authority that the action cannot be maintained. (*Schultz v. Schultz*, 89 N. Y. 644.) There is nothing in the Domestic Relations Act (Laws of 1896, chap. 272, § 27) which works any change in the law in this respect."

"We can only add our recommendation to that of Judge DAVIS in his dissenting opinion in the Supreme Court in the Schultz case, that it is a proper subject for legislative action.

"The judgment in this case has awarded costs against the wife, and is, therefore, wrong. The ground which refuses relief rests upon the common-law doctrine of the unity of the parties, and is, therefore, to be considered as a judgment against the successful party. However inconsistent this may seem, it is the law. While the wife is given the full enjoyment of her separate estate and of her earnings, is permitted to carry on a separate business, may contract with her husband and sue him for debt or for a conversion of her property, yet, for the purpose of being a subject for an assault and battery by the husband, she is both wife and husband, and, therefore, without civil remedy. She is not left without comfort, however, for our law has humanely said that, while she may be assaulted and battered by her husband, and civil remedy be denied, yet she shall not also be mulcted in costs for an attempt to use a remedy to which she is not entitled. Herein lies the strength of the adjudications."

Judgment was rendered upon the finding, from which this appeal is prosecuted.

The assignment of errors presents two questions :

First. Was the verdict sustained by the evidence?

Second. Can a married man commit larceny as to the goods of his wife?

[Omitting opinion upon the first question.]

The main contention upon which appellant's counsel rely, in their able brief, is that husband and wife, living together as such, cannot steal one from the other; that to constitute a valid charge of larceny, the indictment should show that at the time of the alleged crime they were living separate and apart, and that the taker then had neither the possession nor right to possession of the other's property. This is urged at great length, with liberal quotations from the common law and sacred history to the effect that husband and wife are one person, and hence incapable of larceny one from the other. Such was the law for ages, and so remains unless overthrown by the legislative enactments of 1881, and prior thereto.

By section 5324, R. S. 1881, Burns' Rev. 1894, section 7289, marriage is declared to be a civil contract, into which males of the age of eighteen and females of the age of sixteen, not under certain disabilities therein specified, are capable of entering. The only difference between it and other contracts is that marriage is the more priceless and sacred.

By section 5115, R. S. 1881, Burns' Rev. 1894, section 6960, all the legal disabilities of married women to make contracts are abolished, except as further provided in the act of which it is a part.

Section 5117, R. S. 1881, section 6962, Burns' Rev. 1894, provides that: "A married woman may take, acquire, and hold property, real or personal, by conveyance, gift, devise, or descent, or by purchase with her separate means or money; and the same, together with all the rents, issues, income, and profits thereof, shall be and remain her own separate property, and under her own control, the same as if she were (sole and) unmarried. And she may, in her own name, as if she were unmarried, at any time during coverture, sell, barter, exchange, and convey her personal property; and she may also, in like manner, make any contracts with reference to the same," etc.

The same section also provides that "she shall be bound by an estoppel *in pais*, like any other person."

Section 5118, R. S. 1881, Burns' Rev. 1894, section 6963, binds a married woman by her covenants of title in conveyances of her separate property, as if sole, and, in like manner, as principal on her official bond.

Section 5120, R. S. 1881, Burns' Rev. 1894, section 6965, makes all married women liable for torts committed by them, and exempts the husbands from liability from the contracts or torts of their wives.

Section 5130, R. S. 1881, Burns' Rev. 1894, section 6975, vests a

wife with the earnings or profits accruing from her separate trade or business.

Section 5131, R. S. 1881, Burns' Rev. 1894, section 6976, empowers her to prosecute or maintain actions in her own name against persons for damages for injuries to her person or character, the same as if she were sole; and gives her the money so recovered.

Prior to the enactment of the several sections of the statutes of this State the common law fiction prevailed of the legal unity of husband and wife. In the eye of the law they were one person, and the husband was that person.

In Blackstone's Comm., book 2, *433, the old rule is thus stated: "A sixth method of acquiring property in goods and chattels is by marriage; whereby those chattels which belonged formerly to the wife, are by act of law vested in the husband with the same degree of property and the same powers, as the wife, when sole, had over them. This depends entirely on the notion of a unity of person between husband and wife; it being held that they are one person in law, so that the entire being and existence of the woman is suspended during coverture, or entirely merged or incorporated in that of the husband. And hence it follows, that whatever personal property belonged to the wife, before marriage, absolutely vested in the husband."

The learned judge below held the indictment good upon the ground that the recent statutes give the wife exclusive control and authority over her personal property, and have greatly enlarged her personal rights as to the disposition thereof, making contracts and doing whatever a *feme sole* might do; and that the effect of such statutes is to sever the unity of person and community of property heretofore existing between husband and wife. There seems to be sound logic in this position. By virtue of these beneficent statutes, a woman may hold her own property; make her own money; enter into her own contracts; pay her own debts. She may even contract with her own husband. If he defrauds her she may recover. If a woman may contract, under these statutes, with her husband and recover for a breach of contract, or for cheating her, it would seem reasonable to conclude that he may steal from her also, where the circumstances attending the wrongful act are such that if performed by another it would constitute a felonious asportation. Under the enabling statutes of Indiana the husband's interest in the wife's goods and chattels is abolished, and with its destruction the right also to fraudulently misappropriate them.

In *Garret v. State*, 109 Ind. 527, the defendant was indicted for burning the property of "another person," to wit: The property of Hannah Garret. The evidence showed that he and his wife Hannah, the owner of the dwelling house so destroyed, occupied, used, and dwelt therein, as their habitation, and yet this court said: "If a man unlawfully, feloniously, wilfully and maliciously sets fire to and burns the dwelling house of his wife, wherein she permits him to live with her as her husband, he is guilty of the crime of arson, as such crime is defined in our statute."

Arson, as defined in our statute, is an offense against the property, as well as the possession. Larceny is also an offense against the right of private property, and if the husband can commit the crime of arson against her private property it would seem to follow as a legal conclusion that he can also perpetrate the crime of larceny of the wife's goods.

In our opinion the judgment of the trial court should be, and it is, affirmed.

SECTION XI.

Effect of Marriage upon the Ante-nuptial Liabilities of the Parties to Each Other.

POWER v. LESTER.

1861. 23 *New York*, 527.

APPEAL from the Supreme Court. This suit was instituted to foreclose a mortgage bearing date April 1, 1851, executed by Melvin Power to the plaintiff upon lands in Ontario county, collateral to a bond of the same date for the sum of \$951.92, payable with interest on the 1st of April, 1855. In the year 1852, the plaintiff and the mortgagor intermarried. Afterwards in May, 1856, the plaintiff's mortgage being due and unpaid, she joined with her husband, the mortgagor, in executing another mortgage to the defendant Lester on the same land, and a large amount of other lands, collateral to the husband's bond for \$60,000. In October, 1856, a foreclosure suit was commenced by Lester on the last-mentioned bond and mortgage. That suit resulted in the usual decree of foreclosure and sale, under which the mortgaged lands, including those embraced in the plaintiff's mortgage, were sold in the year 1857 to the defendant Lester, and he received the sheriff's conveyance pursuant to such sale. The decree contained a clause saving the rights of the plaintiff, if she had any, and the question in the present case was, whether her mortgage was cut off by her marriage with Power, the mortgagor, by her joining in the mortgage given afterwards to Lester, and the foreclosure thereof. The case was tried before WELLES, J., in the Supreme Court, who, after ascertaining by a reference that the sum due to the plaintiff was \$1,516.98, pronounced the usual decree in her favor. Lester appealed to the court at general term where the decision was affirmed, and he then appealed to this court.

Selah Mathews, for the appellant.

George F. Danforth, for the respondent.

JAMES, J. Two questions are presented by the appellant for consideration: *First*. That by the marriage of the plaintiff with Power, the defendant and mortgagor, her bond and mortgage became extinguished; *Second*. That the mortgage of the plaintiff and Power to Lester operated as a release of the plaintiff's mortgage interest in the mortgaged premises.

It was a general rule of the common law that, where a man married a woman to whom he was indebted, the debt was thereby released. Thus, if the husband obligor took the obligee to wife, the bond was discharged at law, because husband and wife make but one person

in law, which unity of persons disabled the wife from suing the husband. (Co. Litt. 264, b; 2 P. Will. 243; Bright on Husband and Wife, 18.)

Of late years material changes have been made in the law affecting the rights of husband and wife, both in this country and in England, and particularly in this State. The rule of the common law, which ignored the civil existence of the wife, and merged it, with all her rights, in that of the husband, has been modified or superseded. Modern legislation, in its march of reform, actuated by a wise and just policy, has, to some extent, swept away the despotism of the common law in this particular, and placed the wife, as to her separate estate, independent of the control of the husband, and declared her to have a separate legal existence and separate rights of action.

In this State, the Code and the acts of 1848 and 1849 have completely swept away the common-law rule which gave the husband rights in and control over the property of the wife. Now, every female, in respect to property owned by her at the time of marriage, continues its owner after marriage, with full power to use, control or dispose of it, in every particular, the same as if she had remained unmarried. Marriage no longer operates upon the property, but only upon the person; by it the estate of the female is no longer transferred to the husband, nor the right to use or control it. The statutes declare "that the property of any female who shall thereafter marry, and which she shall own at the time of marriage, shall continue her sole and separate estate, as if she were a single woman." This language is clear and explicit: it leaves no room for doubt or construction, and should receive at the hands of the court a faithful and fair application.

This plaintiff was not married until 1852, after the acts of 1848 and 1849; at the time she owned these bonds and mortgages—they were her separate estate, and the statutes declare that such property shall continue her sole and separate property as if she were single. If single, no one would doubt her right to maintain this action. To hold that the marriage released the debt, would be to nullify the express language of the act. The statutes are inconsistent with the common law, and as both cannot stand, the latter must yield. The reason for the common-law rule, viz.: the unity of persons which disabled the wife from suing the husband, has also been repealed. (Code, § 114.) The wife has been admitted to separate rights of action as well as of property. Now a wife may maintain an action in her own name, concerning her separate estate against her husband or any other person. I am, therefore, of the opinion that these bonds and mortgages were not extinguished by reason of the intermarriage of the mortgagor and mortgagee, but that the wife may, notwithstanding, maintain an action in her own name for their foreclosure.

[Omitting remainder of opinion; also opinions of COMSTOCK, C. J., and DENIO, J.]

Judgment affirmed.

SECTION XII.

Ante-nuptial Contracts, and Ante-nuptial Torts of Wife.

BERLEY v. RAMPACHER AND WIFE.

1856. 5 Duer (New York Superior Court), 183.¹

APPEAL by plaintiff from a judgment at Special Term.

Action to recover the price of goods sold to the defendant, Margaret, *dum sola*. The parties were married after the passage of the Act of 1848, Chapter 200 [stated *ante*, p. 513]. The judge at the Special Term decided that the husband was not liable.

S. P. Nash, for plaintiff.

D. P. Whedon, for defendants.

DUER, J. If the rule of the common law, by which the husband is made liable for all the debts of the wife, contracted by her before the marriage, rested solely upon the transfer to him, which the marriage effects, of all the personal property of the wife, there would be great force in the argument, that the act of 1848, by preventing his acquisition of the property of the wife, has discharged him from his liability for her debts. The case might then, not unreasonably, be held to fall within the purview of the very sensible maxim, that "*cessante ratione, cessat etiam lex*." But it is manifest, upon a very slight consideration of the authorities, that the acquisition, by the husband, of the property of the wife, is not the sole foundation of his common law liability for her debts, although it may justly be urged, as mitigating, in some degree, the severity of the rule. His liability, it is certain, is absolute and unlimited, without any reference whatever to the property which he acquires, or to which he may become entitled. It exists, even when the wife, at the time of the marriage, has no property at all, present or future, or when all that she then possesses, or to which she may become entitled, is settled to her sole and separate use. We cannot, therefore, say that the fact, or extent, of his liability, is at all affected by the provisions of the act of 1848. There is no more reason for saying, that a settlement, by a general law, of the property of the wife, to her separate use, can operate to discharge the husband from the payment of her debts, than a settlement of the same character, made by a husband or parent, before the marriage, by a devise or ante-nuptial contract. In both cases, the continued liability of the husband is entirely consistent with the legal effect of the settlement.

It is possible, and, perhaps, not improbable, that the legislature, in depriving the husband of that interest in the property of his wife,

¹ Statement abridged. Arguments omitted.—ED.

which the common law gave to him, meant to exonerate him from her debts, but we can deduce no such intention from the words, or the provisions, of the act of 1848; and it is needless to cite authorities, to show that it is only by express words, or by a necessary implication, that a legislative enactment can operate as a repeal or alteration of an established rule of the common law. That there are express words of repeal, in the act of 1848, is not pretended, and it is just as certain, that it contains no provisions from which the intention to repeal must necessarily be implied. We must, therefore, hold, that the defendant, Adolph, became a debtor to the plaintiff, when he intermarried with the defendant Margaret, and that he was such debtor when the act of 1853 was passed. Has that act discharged him from this liability? The act provides, that an action may be maintained against husband and wife, jointly, for a debt of the wife, contracted before marriage, but that execution on any judgment in such action, shall only issue against, and the judgment shall only bind, the separate estate of the wife; and it is contended, that these provisions are clearly applicable to the case before us, and made it the duty of the Judge, at Special Term, to render the exact judgment that he has given, and which it is, therefore, our duty to affirm.

It is manifest, however, that we cannot so decide, without giving to the provisions of the act in question, a retrospective operation; nor, without holding, that the act thus construed, was a valid exercise of legislative power. We can do neither.

[Omitting remainder of opinion; also opinion of HOFFMAN, J.]

Judgment below reversed. Judgment entered against both defendants.

CONNOR v. BERRY.

1868. 46 *Illinois*, 370.

LAWRENCE, J. The only question presented by this record is, whether the husband is liable for the debts of the wife contracted before coverture, the marriage having taken place since the passage of the law of 1861, for the protection of married women in their separate property. It is contended for the appellants, with a good deal of plausibility, that, as that act secures to a married woman the separate control and enjoyment of her property, the reason of the common law rule imposing liability upon the husband, and with the reason, the rule itself must be considered as having ceased. But we are not prepared to say the reason has so far ceased as to justify us in overturning, by judicial construction, a rule so firmly established in our law. All that can be truly said, is, that the act of 1861 has, in part, abolished the grounds upon which the courts and text writers have

placed the liability of the husband, but it has not wholly done so. That liability rests not merely upon the fact that, by the common law, the husband becomes, upon marriage, the owner of his wife's personal property, when reduced to possession, and of a life-estate in her realty, but also upon the ground that he is entitled to the entire proceeds of her time, industry and skill. As a means of paying her debts, it can hardly be said that her earnings are of less consequence than her accumulated property. In most cases in this country they would be of far greater. Yet this court has held in *Bear v. Hays*, 36 Ill. 280, and in several subsequent cases, that, notwithstanding the act of 1861, the husband is still entitled to the wife's earnings. So it has held in *Cole v. Van Riper*, 44 Ill. 58, that he still has a qualified tenancy, by the curtesy, in her lands. With these legal incidents of marriage still existing, we cannot say the legislature intended by the act of 1861 to relieve the husband from the obligation to pay his wife's debts imposed upon him by the existing law.

Judgment affirmed

HOWARTH v. WARMSER.

1871. 58 Illinois, 48.¹

ACTION by Warmser against James Howarth, and Margaret his wife, for debt contracted by said Margaret, Oct. 20, 1869. The defendants were married in 1870. The Circuit Court rendered judgment against the defendants. James Howarth appealed.

C. W. & E. L. Thomas, for appellant.

G. & G. A. Koerner, for appellee.

LAWRENCE, C. J. We held, in *Connor v. Berry*, 46 Ill. 370, and *McMurtry v. Webster*, 48 ib. 123, that the husband was still, as at common law, liable for the debts of his wife, contracted before marriage, notwithstanding the act of 1861, because that act still left to the husband the wife's earnings. Since those decisions were made, the legislature, by the act of 1869, has taken from the husband all control over the earnings of his wife, and thus swept away the last vestige of the reasons upon which the common law rule rested. The rule itself must now cease. Legislative action has virtually abolished it, by taking away its foundations and rendering its enforcement unjust.

The judgment must be reversed and the cause remanded.

Judgment reversed.

¹ Statement abridged.—ED.

SECTION XIII.

*Liability of Either Spouse to Support the Other.*KENT, CHANCELLOR, IN METHODIST EPISCOPAL CHURCH
v. JAKUES.1815. 1 *Johnson Chancery* (New York), 450, pp. 458, 459.

KENT, CHANCELLOR. . . . No allowances are to be made to the defendant, *J. D. Jaques*, for the maintenance of his wife and family, during the coverture, that being a duty chargeable upon him as husband; and, in no respect, chargeable upon the wife's separate estate. Such an allowance would be a fraud upon the marriage settlement, by which it was expressly declared, that the husband was not to have any right, or interest, in law or equity, in or to any part of her estate, but the same was to be subject only to such uses as she should declare by deed, and to her separate and only use and benefit. The estate was not to be subject to his control or engagements; and, to render it chargeable with the maintenance of her or his family, would be in violation of the settlement, and defeat or impair its provisions. I have not, therefore, paid any attention to the parol proof of the confessions of the wife during the coverture, as to any agreement that the family expenses were to be borne by her separate estate. Such confessions are in contradiction to the solemn contract of the parties, by deed, when they were separately capable of making such a contract; they must be viewed with the utmost jealousy, as made under improper influence, and cannot be permitted to be set up by the husband to impair the rights of his wife under the settlement. The utmost that I can do in this case is, to allow the husband to be credited with any necessary reparations bestowed by him on any part of her estate; and with any particular specific appropriation of her property, (not being for the ordinary maintenance of her or his family,) which may have been made by her especial assent and direction, in the given case, and, apparently, for her benefit. In one case (4 Bro. 409) an allowance was made to the husband, out of the wife's separate estate, for *extra* expenses in her maintenance; but the burden was there peculiar and extraordinary, on account of mental derangement.¹

¹ "Several witnesses swear, that she repeatedly declared that her household establishment, and all her family expenses, were supported and paid out of her estate, according to the mutual understanding between herself and her husband previous to their marriage. And this arrangement so probable, and so reasonable, accords with all her subsequent life and conduct. It is true, that such an agreement was *revocable* at her pleasure; and if she had insisted upon her strict legal rights, her husband was bound to maintain her, at his own expense, but certainly not in such a style as she chose, and had been accustomed to." PLATT, J. in *Jaques v. Methodist Episc. Church*, 17 Johnson (New York), 548, p. 593.—ED.

ESTATE OF WAESCH.

1895. 166 Pa. State, 204.

ARGUED Jan. 9, 1895. Appeal, No. 382, Jan. T., 1895, by administrator, from decree of O. C., Phila. Co., Oct. T., 1893, No. 327, dismissing exceptions to adjudication. Before STERRETT, C. J., GREEN, WILLIAMS, McCOLLUM, MITCHELL, DEAN, and FELL, JJ. Affirmed.

Exceptions to adjudication.

From the adjudication it appeared that decedent died intestate, leaving to survive her a husband, who subsequently took out letters of administration on her estate, and an illegitimate son of full age who was a resident of Germany. At the audit it appeared that the decedent had been a lunatic, and had been ill for some time immediately prior to her death, and that expenses had been incurred for her maintenance and burial. By the adjudication the court awarded the estate to the husband and to the illegitimate son, but directed the above mentioned expenses to be deducted from the husband's share. 3 Dist. R. 176.

Exceptions filed alleged error as follows :

"1. In charging against the distributive share of John Waesch, the entire expense of the decedent's board and funeral expenses ; the same should have been borne by her estate.

"2. In awarding the sum of \$578.48 to Johann Herrmann, the illegitimate son of the decedent, who was a resident of Germany, as he was not contemplated by the act of 1855, Purdon, 934, pl. 40."

The following opinion was filed by HANNA, P. J.

"As to the first exception little need be said, as the liability of the husband for the funeral expenses of his wife, medical attendance upon her, etc., even although she has a separate estate, is too well settled to admit of argument. He is primarily liable, and her estate is liable only in case he is insolvent. But if any balance remains for distribution as in this case, then the expenses he should have paid will be deducted from his distributive share." *Costigan's Estate*, 13 Phila. 264 ; *McCormick's Estate*, 4 Kulp, 15 ; *Wauhoup's Estate*, 29 Pitts. L. J. 256 ; *Darmody's Estate*, 13 Phila. 207 ; *Welber's Estate*, 20 Phila. 8.

[Omitting opinion as to second exception.]

Charles F. Linde, for appellant.

[Citations omitted.]

Gustavus Remak, Jr., for appellee.

[Citations omitted.]

PER CURIAM. Both of the questions presented by the specifications of error, were rightly decided by the orphans' court. It is unnecessary to add anything to what has been said by the learned president of that court, and we therefore affirm the decree on his opinion.

Decree affirmed, and appeal dismissed with costs to be paid by appellant.

DOLAN v. BROOKS.

1897. 168 *Massachusetts*, 350.¹

CONTRACT, to recover the price of a dress furnished by the plaintiff to the wife of the defendant, who had a separate income. Trial in the Superior Court, without a jury, before DUNBAR, J.

Plaintiff requested the judge to rule . . . 4. That the fact that the wife had a separate income — such fact being uncommunicated to the plaintiff — does not release the husband from his liability to pay for goods suitable to the wife's station in life, supplied by the plaintiff to the wife while husband and wife were living together.

The judge declined to give the above ruling; and ruled that the non-communication to the plaintiff of the fact that the wife had a separate income was immaterial.

The judge found for the defendant; and plaintiff alleged exceptions.

W. B. F. Whall, for plaintiff.

E. M. Johnson, for defendant.

MORTON, J.

It is not contended that the wife had express authority from the defendant to purchase the dress. The plaintiff relies on the obligation which a husband is under to furnish his wife with necessaries suitable to her station in life, and on the authority which she has by law, in case of his neglect to do so, to purchase them on his credit. The question is whether, under the circumstances of this case, the defendant is liable on that ground. A wife has not authority to purchase on her husband's credit such clothing as she deems suitable and proper. Generally speaking, it is only in cases of necessity that the law constitutes her his agent with authority to pledge his credit. This is the law in England, as well as here. *Raynes v. Bennett*, 114 Mass. 424; *Conant v. Burnham*, 133 Mass. 503; *Debenham v. Mellon*, 6 App. Cas. 24; *Jolly v. Rees*, 15 C. B. (N. S.) 628. It is possible that the husband's consent to or acquiescence in the doing of certain things by the wife may constitute her his agent *quoad* such matters. Such an agency may be presumed, perhaps, under some circumstances, in regard to those things relating to the family, for instance, which it is usual for the wife to do, and which she does without any question or objection on the part of her husband. *Debenham v. Mellon*, *ubi supra*. This case, however, as already observed, stands on a different ground from either of those just referred to.

The plaintiff and his wife were living together, and he paid all of the expenses for the maintenance of the household, except those for the clothing of his wife and daughters. The bulk of those was paid by the wife out of her income. She had been accustomed for ten years to,

¹ Statement abridged. — Ed.

do this, though the defendant had paid some bills for clothing contracted by her in his name. For aught that appears, her income was sufficient to clothe her suitably according to her station in life, and it fairly may be assumed that it was understood between them that it should be used by her in this manner. We do not see how, under such circumstances, the defendant can be held liable. Assuming that the dress was suitable according to her station in life, it does not appear that the defendant had refused or neglected to provide his wife with suitable clothing, and consequently one of the essential grounds in which the law raises an agency in the wife's favor to bind the husband was wanting. Further, the judge who heard the case may have found that, although the dress was suitable, it was not necessary.

We do not mean to intimate that the fact that a wife has an income of her own relieves the husband from his obligation to support her, or absolves him from liability for suitable clothing bought by her in consequence of his refusal or neglect to provide it for her. It is not necessary to decide that question now. See *Thorpe v. Shapleigh*, 67 Maine, 235; *Liddlow v. Wilmot*, 2 Stark. 86.

The rulings asked for assumed in one form or another that the defendant was liable. As we do not think that he is, it is unnecessary to consider them in detail. The modifications which the judge made in the fourth and sixth rulings asked for were rightly made.

Exceptions overruled.

POOLE v. PEOPLE.

1898. 24 *Colorado*, 510.¹

INFORMATION against Poole, based upon the provisions of section 1412 a, 3 Mills, Ann. Stats. (Laws of 1893, p. 126):

“It shall be unlawful for any man, residing in this state, to wilfully neglect, fail or refuse to provide reasonable support and maintenance for his wife . . . ; and any person guilty of such neglect, failure or refusal, upon the complaint of the wife . . . upon due conviction thereof, shall be adjudged guilty of a misdemeanor, and shall be committed to the county jail for the period of not more than sixty (60) days unless it shall appear that owing to physical incapacity or other good cause, he is unable to furnish such support; *provided*, that in case of conviction for the offense aforesaid, the court before which such conviction is had, may, in lieu of the penalty herein provided, accept from the person convicted a bond to the board of county commissioners of the county in which such conviction is had, with good and sufficient surety, conditioned for the support of the wife . . . for the term of six months after the date of said conviction; and the court may accept

¹ Only so much of the report is given as relates to a single point. — Ed.

such bond at any time after such conviction, and order the release of the person so convicted."

Poole, having been convicted and sentenced, brought error.

Rogers and Rising, for plaintiff in error.

Carr (Attorney General), *Reed, Hipp*, and *Stephenson*, for defendant in error.

GABBERT, J. [Omitting opinion as to other objections.] The statute upon which this prosecution is based does not change the law as to the civil liability of the husband to furnish his wife reasonable support; it provides a penalty in case he fails to do so, unless excused by physical incapacity or other good cause; he is not relieved from furnishing such support on account of the financial means of his wife, either by the general law, or the statute, and so the offer of plaintiff in error to prove that the prosecuting witness had means of her own, at a time several months prior to the institution of these proceedings, it not being claimed that such means were obtained from the husband, was wholly immaterial. There is no reversible error, and the judgment is affirmed. *Affirmed.*

MYERS v. FIELD.

1893. 146 *Illinois*, 50.¹

CREDITOR's bill, filed by Marshall Field *et als.* against Mrs. Sarah D. Myers and her husband.

In 1866, E. B. Myers, being then solvent, paid for a lot of land which he caused to be conveyed to his wife. In 1887 this land was sold, and Mrs. Myers received therefor in value more than \$5000, which she still holds in securities. In 1888, Field *et als.* recovered judgment against Mrs. Myers, upon causes of action accruing subsequently to 1874. The first count in the declaration, in the suit in which the judgment was rendered, declares for goods sold to the defendants, as husband and wife, which "were and became matter of the expenses of the family." Execution issued, and was returned "no property found." Field *et als.* then filed the present bill. The Circuit Court found that the defendant, Sarah D. Myers, owned, and had in her possession, when the bill was filed, money or securities more than sufficient to pay said judgment, all of which were derived by her from the proceeds of the sale of real estate owned by her before the passage of the law making the husband and wife liable for the expenses of the family; and that the same were liable in her hands to be applied to the satisfaction of said judgment; and ordered, that she immediately pay the amount due on said judgment with costs, etc. This decree has been affirmed by the Appellate

¹ Statement abridged from opinion. — Ed.

Court, and is brought here for review by appeal from the latter Court.

G. W. & J. T. Kretzinger, for appellant.

Wilson, Moore, & McIlvaine, for appellees.

MAGRUDER, J. [After stating the case.] Section 1 of the act of 1861, entitled "Married Women," provided: (Gross' Stat. of 1871, page 439,) "All the property, both real and personal, belonging to any married woman as her sole and separate property, or which any woman hereafter married owns at the time of her marriage, or which any married woman, during coverture, acquires in good faith from any person other than her husband, by descent, devise or otherwise, together with all the rents, issues, increase and profits thereof, shall, notwithstanding marriage, be and remain during coverture, her sole and separate property, under her sole control, and be held, owned, possessed and enjoyed by her the same as though she was sole and unmarried and shall not be subject to the disposal, control or interference of her husband, and shall be exempt from execution or attachment for the debts of her husband."

In 1874, section 15 of the present law entitled "Husband and Wife," was enacted, which provides: "The expenses of the family and of the education of the children shall be chargeable upon the property of both the husband and wife, or either of them, in favor of the creditors therefor, and in relation thereto they may be sued jointly or severally."

The question, which is alleged to arise out of the application of these statutes to the facts above recited, is this: If a married woman owned property while the Act of 1861 was in force, and which, by the terms of that Act, was exempt from execution for the debts of her husband, can the subsequent Act of 1874 be so far enforced against such property, or the proceeds of its sale, as to subject it to the payment of a judgment rendered against the wife for the expenses of the family? It is contended, that the right of the wife, under the Act of 1861, to have the property, belonging to her as her sole and separate property, exempt from execution for the debts of her husband, was a vested right which she could not be deprived of by subsequent legislation. If this were true, it cannot be said that there is an attempt here to subject the wife's property to her husband's debt. The effort is to make it liable for her own debt. Section 15 of the Act of 1874, as above quoted, was adopted from the Iowa statute, and we concur in the interpretation which the Supreme Court of Iowa has given to it. That Court said, in reference to this section, in *Frost v. Parker*, 65 Iowa, 178: "Here a right is created and a liability declared, but no remedy is provided or pointed out. The right declared is, that the creditor of the husband or wife, for family expenses, may have a remedy against both. The liability created is, that both shall be liable for family expenses. . . . It has been held that, under this provision, each is personally liable." (Referring to *Smedley v. Felt*, 41 Iowa, 588, and other cases).

The judgment is against Mrs. Myers alone, and not against her husband, or against her husband and herself. If it is allowable or necessary to go behind the judgment and examine the declaration, the assumption, that the judgment was necessarily rendered for the cause of action set out in the first count, to wit: "expenses of the family," rather than for some other cause of action embraced in the general consolidated counts, can make no difference as to the personal liability of the appellant. The judgment being against her alone and for a cause of action which was her personal liability, ought to be enforceable against her own property. The Act of 1861 did not exempt the wife's property from execution for her own debts. On the contrary, it provided that her property should be under her sole control, and should be held and owned by her the same as though she was sole and unmarried. It is an incident of ownership, that property should be liable for its owner's debts. (Stewart's Husband and Wife, secs. 204 and 206.) Where a *feme covert* is the sole and exclusive owner of property, she holds it with all the incidents of property, the right of selling, giving, or charging it with the payment of debts. (*Clark v. Valentine*, 41 Ga. 143.)

It seems, however, to be claimed by counsel for appellant that, before the Act of 1874, the husband was liable for the expenses of the family; that by that Act the wife was made to share the liability of the husband; and that the Act cannot have the effect of charging such newly created liability upon property owned by the wife before its passage without giving to it a retrospective operation. It is conceded that the debt, for which the judgment in this case was rendered, accrued after the Act of 1874 was passed. The first section of the Act provides, that a married woman may, in all cases, sue and be sued without joining her husband with her to the same extent as if she were unmarried, and an attachment or judgment in such action may be enforced by or against her as if she were a single woman. Whatever is a legitimate expense of the family is for her benefit, as she is a part of the family. We see no reason why the legislature has not the power to say, that she or her property shall be liable for a debt incurred by her, or for her benefit. Debtors have no vested right not to pay their debts. What they have and what they acquire the State may subject to legal process for the satisfaction of creditors. (*Harris v. Glenn*, 56 Ga. 94.) The exemption of the wife's separate property from liability for the expenses of the family under the Act of 1861 was a privilege. It is well settled, that the citizen has no vested right in statutory privileges and exemptions when no element of contract or grant arises out of the statute. Such privileges and exemptions rest upon reasons of public policy, and may be recalled or changed by the legislative branch of the government. Among them are exemptions of property from being seized on attachment, or execution, or for the payment of taxes.

[Omitting part of opinion.]

So far as the facts of the present case are concerned, the Act of 1874 is not retrospective by an application of its provisions to any debt created or existing before its passage. It is prospective in that it is here made to apply only to a debt created by the wife, or for her benefit, after its passage.

Judgment affirmed.

GEORGE v. EDNEY AND WIFE.

1893. 36 *Nebraska*, 604.¹

PETITION, alleging that plaintiff recovered judgment against T. Edney, for necessities furnished to him and used in his family; that execution issued and was returned unsatisfied; that T. Edney has no property within the State upon which a levy can be made; but that Ida M. Edney, wife of T. Edney, owns real estate situate within the State. The petition prays that plaintiff's judgment may be declared a lien upon said real estate, and that the land may be sold to satisfy the same, and for such other and further relief as may be just and equitable.

In the District Court a general demurrer to the petition was sustained, and the action dismissed. Plaintiff appealed.

Greene & Hostetler, for appellant.

F. L. Huston and Evans & Thompson, contra.

MAXWELL, C. J. [After stating the case.]

Sec. 1, chap. 52, Comp. Stats., provides: "The property, real and personal, which any woman in this state may own at the time of her marriage, and the rents, issues, profits, or proceeds thereof, and any real, personal, or mixed property which shall come to her by descent, devise, or the gift of any person except her husband, or which she shall acquire by purchase or otherwise, shall remain her sole and separate property notwithstanding her marriage, and shall not be subject to the disposal of her husband or liable for his debts; *Provided*, That all property of a married woman not exempt by law from sale on execution or attachment shall be liable for the payment of all debts contracted for necessities furnished the family of said married woman after execution against the husband for such indebtedness has been returned unsatisfied for want of goods and chattels, lands and tenements whereon to levy and make the same." In other words, the wife is made surety for her husband for the payment of all "necessaries furnished the family of said married woman." She is to be treated like any other surety and must have her day in court

¹ Statement abridged from opinion. — Ed.

before a judgment can be recovered against her. She may be able to show that the goods furnished were not necessities for the family, or that they were sold upon the exclusive credit of her husband, or she may plead and prove any fact that will show her exemption from liability. This being so, her property cannot be subjected to the payment of the claim until judgment is recovered against her. The petition, however, does not entirely fail to state a cause of action. It does appear that judgment was recovered against the husband for necessities for the family; that an execution has been issued thereon and returned unsatisfied; that Ida M. Edney is the wife of T. Edney and possesses the property described which it is in effect alleged is not exempt. This being so, a general demurrer will not lie. It does appear that the plaintiff is entitled to some relief from the defendants, and therefore it must be overruled. The petition must be amended, however, and judgment sought against the wife. Our attention has been called to the case of *Frost v. Parker*, 21 N. W. Rep. [Ia.] 507, where judgment was recovered against the husband alone for necessities furnished to the family and an execution returned unsatisfied, whereupon without a judgment against the wife her property was subjected to the payment of the judgment. The Iowa statute is somewhat broader than ours, but we are unable to assent to the reasoning in that case or the conclusion reached. The wife certainly occupied the relation of surety for her husband, and was entitled to make any defense in her favor that was then in existence. This she seems to have been denied, which is a wide departure from the just rules that generally prevail in that able court. The judgment of the district court is reversed and the cause remanded for further proceedings.

Reversed and remanded.

LAWRENCE v. SINNAMON AND WIFE.

1867. 24 Iowa, 80.

APPEAL from Wapello District Court.

This action was commenced November 15, 1866. The petition makes this case: From April, 1857, to January, 1858, plaintiff sold to the defendant, Thomas Sinnamon, goods and merchandise as per account annexed, some to the husband, some to the wife, but all were purchased and received for the use of the family of defendants; were necessities, were thus used, the expense thereof was a family expense, within § 2507 of the Revision, and properly chargeable upon the property of both; that these articles were charged, in accordance with the usual custom of merchants, to the husband, and in accordance with a like custom in balancing the books, plaintiff, as evidence of said indebtedness, in January, 1858, took the hus-

band's note for the amount of said account, not as payment, nor with that intention, nor that it should operate as a release of plaintiff's rights or defendant's liability, but merely to change the form of evidence of said indebtedness. The claim is for judgment against both defendants.

Defendants demurred, because it appeared affirmatively, from the petition, that plaintiff's cause of action was barred by the statute of limitations. This demurrer was sustained, and plaintiff appeals.

Stiles & Hutchison, for the appellant.

Hendershott & Burton, for the appellee.

WRIGHT, J. If the petition shows affirmatively that the cause of action is barred, then, under the statute, the objection may be taken advantage of by demurrer. Rev. §§ 2961, 2962.

We then inquire, does this affirmatively appear? As to the husband, we answer most unhesitatingly, clearly not. Plaintiff counts upon the facts, and this was needful to show the wife's liability. But, though the last item of the account is dated in January, 1858, and though without more the action would have been barred in July, 1863 (§2740 Rev. Cl. 3), it must be remembered that the husband, in 1863, promised in writing to pay the very debt, and the remedy was, therefore, not barred as against him, at least, for ten years from the writing of that note. As to him, the case stands as though he had made a new promise to pay any other indebtedness, whether the prior promise was implied or express, verbal or in writing. And this is true, whether it did or did not operate to satisfy the pre-existing debt.

But manifestly the important question is, whether plaintiff's remedy against the wife is barred by the statute. And here, also, we feel constrained to hold that the court below erred.

By § 2507 of the Revision, it is declared that the expenses of the family, the education of the children, and such other obligations as come within the equity of the provision, are chargeable upon the property of both husband and wife or either of them, and in relation thereto they may be sued jointly, or the husband separately. The prior section provides that the husband is not liable for the separate debts of the wife, nor is her separate property liable for his debts; but the separate debts of the wife, thus referred to, include only contracts made in relation to her separate property or such as purport to bind herself only. But, because the expenses of the family and the education of the children should, to the extent of their property, be met by each, the legislature has provided, that, for just such expenses, their property shall be chargeable. Not that the wife is liable generally, though the husband is, but that the property is liable. And here we remark, that there is no objection that the petition seeks a general judgment against the wife. Nor is it suggested that there is nothing to show that she has property upon which this debt should be a charge. The only point made is that the claim is

barred. The husband is the head of the family. He determines primarily what is needed for it. He buys, furnishes, contracts debts, all in his own name, for the support and welfare of the family. Her name need not be known. In the absence of fraud and collusion between the creditor and the husband, or some other circumstances giving to the wife peculiar equities, these debts, though contracted by the husband, to the extent of their property, bind both; and his acts, agreements and promises, are alike obligatory upon both.

If he contracts a debt for the education of the children, and gives his note payable three years thereafter, the cause of action accrues as against both at the maturity of the note, and not at the time the debt was contracted. So if he buys flour, meal, sugar, coffee, butter and other articles, and shall, at the time of obtaining the credit, promise to pay in one, two or three years thereafter, the statute does not run as to either, until the time of payment expires. And the same is true where he, after the articles or goods are furnished, gives his promise to pay; the maturity of this promise being the time when the cause of action accrues. These expenses are in the nature of equitable charges upon the property of each. The fact that the form of evidence of the indebtedness is changed from an account to a note makes no difference, unless, indeed, there was an agreement or understanding that the creditor looked alone to the husband — a fact which is expressly rebutted by the averments of the petition. It is not unlike a mortgage executed by husband and wife to secure the note of the husband. The renewing of the note by the husband does not discharge the lien. Nor in such a case would the statute run in favor of either from the maturity of the first note, but of the new one.

Our law is liberal in protecting the rights of the wife, in relation to her property real and personal. But it has not gone so far as to abolish the headship of the family nor to take from the husband the right to exercise his best judgment and discretion in the management of his affairs. They are alike interested in the education of the children and for the support of the family. For the expenses thereof it is both right and proper that the property of each or both should be liable. She, as a rule, must be governed by his contracts in relation to these matters. The law does not contemplate the consent and action of both. The merchant, grocer, miller or teacher need not wait until she joins with him in the request for credit, or before making a contract to furnish articles for the family or the education of their children. But they may contract with him as one whose being is not merged in that of his wife, and whose contracts, within the provisions of the statute, are chargeable upon the property of both. And if he in good faith obtains an extension of time for the payment of such an indebtedness, she is entitled to whatever advantage he thus gains, and must as a rule be held to the same remedies and defenses.

Reversed.

HAGGARD v. HOLMES.

1894. 90 Iowa, 308.

APPEAL from the Muscatine District Court. — HON. W. F. BRANNAN, Judge.

Action to recover the amount due on certain promissory notes given by the defendant, W. G. Holmes. His wife and co-defendant Hannah Holmes, filed a demurrer to the petition, which was overruled, and then filed an answer, which contained two divisions. A demurrer of the plaintiff to the second division was overruled. He elected to stand on his demurrer, and judgment was rendered in favor of Hannah Holmes for costs. The plaintiff appeals. — *Affirmed*.

N. Rosenberger and *Detwiler & Doran*, for appellant.

No appearance for appellee.

ROBINSON, J. The petition alleges that the defendant W. G. Holmes purchased an atlas or history of Muscatine county, Iowa, with pictures of himself and his wife inserted therein, and that he gave the notes in suit in settlement of the indebtedness incurred by his purchase; that the book was purchased for the benefit of the family of the defendants, and was used and kept for use by the family. In the second division of her answer, Mrs. Holmes alleges that, when the vendor of the book sought to sell it to her husband, she protested to the vendor against the purchase, and notified him that she did not want the atlas, and would not purchase or pay for it; that the vendor induced her husband to take the book, and give his notes for it, against her protest, well knowing that she had refused to sanction or consent to the purchase, with intent to cheat and defraud her, and to compel her to pay for the book from her separate property, under the pretense that the purchase was a family expense. The theory of the plaintiff's demurrer is that the husband, as the head of the family, had the right to incur a family expense, and thereby charge the separate property of the wife, although she objected to the purchase, and refused to consent to it. The pleadings do not show that the book was a family necessity. Something is claimed by the appellant from the ruling of the district court on Mrs. Holmes' demurrer to his petition, but the most that can be said for it is, that it held that the book was an item of family expense, because purchased for, and kept and used by, the family. It was not held, and the pleadings do not show, that it was a family necessity. We are, therefore, required to determine whether the husband may bind the property of the wife against her will, and notwithstanding her protest, in purchasing an article which is used by their family, and is properly classed as for the use and benefit of the family, but is not necessary for it. Section 2214 of the Code is as follows: "2214. The expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be shed jointly or sepa-

rately." That section was construed in *Devendorf v. Emerson*, 66 Iowa, 698, 24 N. W. Rep. 515, where it was held that family supplies sold to the wife, when the sale had been forbidden by the husband, there being no evidence that there was a necessity for the purchase, were not chargeable upon the property of the husband. Some prominence was given to the fact that, as a general rule, the husband is the one upon whom the family depends for support, and that he was supporting the family in that case, and had the right to decide of whom he would purchase the family supplies; but the decision did not wholly rest upon that fact. We think that the doctrine of that case is applicable to this, and that the husband can not fix a liability, as against the wife, by purchasing articles for the family which are not needed by it, when she has, in effect, forbidden the purchase, refusing to be bound by it, and has duly notified the vendor of that fact. We conclude that the demurrer of plaintiff was properly overruled, and the judgment of the district court is affirmed.

NEASHAM v. ANNA I. MCNAIR.

1897. 103 Iowa, 695.

APPEAL from Wapello District Court. — HON. F. W. EICHELBERGER, Judge.

The petition alleges that the defendants are husband and wife, a family of large fortune, high social rank, and luxurious habits; that O. E. McNair purchased an article of jewelry for his personal use and adornment, and used the same for such purpose; that he afterward executed a note therefor, no part of which has been paid. It was admitted that the article referred to is a diamond shirt stud. Anna I. McNair demurred on the ground that such stud is not an expense for the payment of which she is liable. The plaintiff elected to stand on the ruling by which the demurrer was sustained, and appeals from the judgment dismissing the petition. — *Reversed*.

Work & Lewis, for appellant.

W. S. Coen, for appellee.

LADD, J. Is a diamond shirt stud, worn by the husband for personal use and adornment, an expense of the family, for which the wife may be liable? Section 2214 of the Code of 1873 provides that "the expense of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately." At common law the husband was liable for any expense incurred in the clothing and maintenance of the wife and children, suitable to his situation in life. The term "necessaries" was not confined to food and clothing, but was construed to include articles of utility and ornament ordinarily enjoyed by families of persons of estate and station similar to that of the hus-

band. The wife, however, was not chargeable for necessities, and there was no remedy for articles purchased by her and used in the family, when not included in that term. The statute obviates determining the vexatious question of what are necessities, and affords an adequate remedy against both husband and wife. *Smedley v. Felt*, 41 Iowa, 588; *Schrader v. Hoover*, 80 Iowa, 243; *Blachley v. Laba*, 63 Iowa, 22; *Devendorf v. Emerson*, 66 Iowa, 698. The expense, however, is limited to that of the family, and must have been incurred for something used therein, or kept for use of or beneficial thereto, and may include articles which enhance domestic comfort and increase social enjoyment. *Fitzgerald v. McCarty*, 55 Iowa, 702; *Smedley v. Felt*, *supra*. In the latter case a piano was adjudged a family expense. "Family" is defined as a collective body of persons who live in one home, under one head or manager. *Menefee v. Chesley*, 98 Iowa, 55, and authorities cited. That husband and wife, when living together, as they are presumed to do, are both members of the family, and included in this definition, will not be questioned. Necessaries for which the husband was liable will certainly now be conceded to be a part of the family expense. Clothing seems to have been treated as such. *Finn v. Rose*, 12 Iowa, 565; *Devendorf v. Emerson*, *supra*; *Smedley v. Felt*, *supra*. It is said that this is beneficial to each member only, and not to the entire household. The clothing of every member is a source of comfort and enjoyment to all. It is as essential as the food placed on the table. Indeed, the services of a physician to one member of the family have been deemed a family expense; and so a watch and chain used by the wife and daughter only. *Schrader v. Hoover*, *supra*; *Marquardt v. Flaughner*, 60 Iowa, 148. Wearing apparel is not confined in its meaning to clothing, but includes the idea of ornamentation as well. A watch and chain have been adjudged such. *Brown v. Edmonds*, 8 S. D. 271 (66 N. W. Rep. 310); *McClung v. Stewart*, — Or. — (8 Pac. Rep. 447); *Bumpus v. Maynard*, 38 Barb. 626. Contra, see *Smith v. Rogers*, 16 Ga. 480; *Rothschild v. Boelter*, 18 Minn. 331; *Gooch v. Gooch*, 33 Me. 535; *Sawyer v. Sawyer*, 28 Vt. 252. See 29 Am. & Eng. Enc. Law, 38. In *Sawyer v. Sawyer*, *supra*, a breastpin is held to be a part of the wearing apparel of a deceased husband, which, under the Vermont statute, goes to the widow. But the Supreme Court of New Hampshire adjudged a breastpin "not to be wearing apparel necessary for the debtor and his family." *Towns v. Pratt*, 66 Am. Dec. 726. The question of value and necessity is somewhat controlling in some of the cases referred to. By "wearing apparel" is usually meant clothing and garments protecting the persons from exposure, and not articles of ornament merely. Originally it included, not only the vesture, but all the ornaments and decorations worn with it. That jewelry, when of no purpose other than that of ornament, as a ring, will not be so classified, may be conceded. But if it serves the double purpose of being an article of use, in fastening the garments, or otherwise, and also of adornment to the person, there appears no good reason for not adjudging it a part of the wearing apparel; else much that is pleasing in dress must

be excluded from the meaning of the word, as generally accepted. The ornamentation of a lady's wardrobe is of little utility, yet it is always included in the term. If an article of jewelry is used with and as a part of the clothing, it may well be deemed a portion of the wearing apparel. It may thus serve as necessary and useful a purpose as the garments themselves. Articles of jewelry were often adjudged necessities for which the husband was liable at common law. *Raynes v. Bennett*, 114 Mass. 424; *Porter v. Briggs*, 38 Iowa, 166. These are quite as commonly worn by many people as the clothing that covers them. The make of a shirt or the taste of the wearer may be such as to require some kind of a button or stud. If the inexpensive pearl were used, no one would question the propriety of making it a family charge. But it might be as much out of place in the shirt front of a person of fashion or fortune as a diamond in that of one who earns his bread by the sweat of his face. If the cost, the utility, or the necessity is to be the criterion, then the line must be drawn on many articles of furniture, clothing, and food. What shall be the delicacies of the table, the adornments of the person, and the character of the furnishings, must be left to the better judgment and discretion of each family, which is presumed to, and ordinarily does, act as a unit in such matters. Many families would have no use for terrapin, silks and satins, or Smyrna rugs, or costly jewelry, and in such cases neither husband nor wife would be liable for indebtedness incurred by the other therefor. But, if these are purchased for and used in the family, it is not perceived on what ground they may not be deemed a family charge. Under our statute, there is no occasion for inquiry as to the cost or necessity. Nor is there better reason to investigate the character or value of a button or stud worn, in determining whether it is a family expense, than that of a costly dress, an artistically trimmed bonnet, or a silk hat. The article may be unnecessary, or such as the family ought to have dispensed with, or of no actual utility; still, if purchased for and used in the family, the liability of the wife cannot be avoided. *Dodd v. St. John*, 22 Or. 250 (29 Pac. Rep. 618). If the diamond stud was worn by the defendant's husband, as is alleged, for personal use, as well as adornment, it is an expense such as is contemplated by the statute. Nor does such a holding involve necessary hardship. It is said in the petition that the McNairs are a family of large fortune, high social rank, and luxurious habits. If this be true, the jewelry may well be deemed appropriate to their situation in life, and a source of no inconsiderable outlay in maintaining the family according to their station, and in harmony with their associations. The price of a diamond shirt stud will not in all cases be a family expense, but where procured for personal use, and actually used and worn by the husband, it becomes such. The same rule must be applied to the diamond and the pearl, to the rich and the poor.

Reversed.

ROBINSON, J. (dissenting). I do not agree to what is said in support of the conclusion of the majority.

SECTION XIV.

Criminal Liability.

COMMONWEALTH v. ROBERT WOOD.

1867. 97 *Massachusetts*, 225.¹

INDICTMENT for keeping a tenement used as a house of ill-fame, resorted to for prostitution and lewdness.

At the trial in the Superior Court, before REED, J., there was testimony tending to show that the defendant lived in the tenement and there exercised various acts of control and management, but that it was owned by his wife as her separate property; that she also lived there and carried on the business; that it was resorted to for prostitution and lewdness, and that the defendant did not participate in the profits.

Thereupon the defendant asked the judge to instruct the jury that if they should find that the tenement was owned by the wife as her separate property, and that she was carrying on the business, and that the defendant did not participate in the profits, they should acquit him. But the judge declined so to instruct them, and ruled that if the defendant lived in the tenement with his wife, she being the owner thereof, and it was resorted to, with his knowledge, for prostitution and lewdness, he would be liable as keeper, although the profits of the business were all received by the wife.

The defendant, having been convicted, alleged exceptions.

C. A. Beach, for defendant.

C. Allen, Attorney-General, for Commonwealth.

CHAPMAN, J. The defendant contends that he is not liable because the house was owned by his wife as her separate property, and the business of keeping a house of ill-fame therein, which was resorted to for prostitution and lewdness, was carried on by her, and she took the profits thereof, and he did not participate in them. Whether he is liable in such a case must depend upon the relations which he sustains to the household, while he lives with his wife as her husband.

The doctrine of the common law is that by marriage the husband and wife become one person in law; that she is under his protection, influence, power, and authority, and that he is the head of the household. This condition of the wife is designated by the expressive term *coverture*. One effect of it is, as a general rule, though subject to many exceptions, to excuse her from punishment for many crimes committed by her in presence of her husband, on the ground that she acted under his

¹ Statement abridged. Arguments omitted. — Ed.

compulsion. He alone is held responsible for such crimes. 1 Bl. Com. 442, *et seq.*; 1 Russell on Crimes, 18; *Commonwealth v. Neal*, 10 Mass. 152; *Commonwealth v. Lewis*, 1 Met. 151; *Commonwealth v. Coughlin*, 14 Gray, 389; *Commonwealth v. Hurley*, *ib.* 411. How far he may exercise force in restraining her is not precisely settled. But there can be no doubt that he may exercise as much power as may be reasonably necessary to prevent her as well as other inmates of the house from making it a brothel. It is said in Dalton's Justice that he is liable if she keep an ale-house without license against his will.

But it is contended that the recent legislation of this Commonwealth has made married women so far independent of their husbands as to release the defendant, in such a case as the present, from all responsibility for the conduct of his wife. It is true that the house they lived in appears to have been owned by her to her sole and separate use, free from the control of her husband. But ever since the law of equitable trusts existed, married women have been able to hold property thus independent of the husband's control; and the fact that the family lived in a house thus owned has never been regarded as affecting the rights and power of the husband as head of the family. It is also true that under our statute she may carry on a separate trade on her own account. But it has not been decided how far this affects the husband's legal right to control her, nor is it necessary to decide it in this case. These provisions of the statute relate to legitimate business, and not to the keeping of brothels. They do not take away his power to regulate his household so far as to prevent his wife from committing this offence, or relieve him from responsibility if it is committed.

.
Exceptions overruled.

BIGELOW, C. J., IN COMMONWEALTH v. GANNON.

1867. 97 *Massachusetts*, 547, p. 548.

. . . The provisions of the statutes (Gen. Sts. c. 108) regulating the rights and liabilities of married women as to their property and in certain civil proceedings, have in nowise changed or modified the rules of evidence or the legal presumptions applicable to them and their acts in criminal proceedings.

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MORTON, J., IN COMMONWEALTH v. BARRY.

1874. 115 *Massachusetts*, 146, p. 148.

The statutes which give to a married woman the right to carry on any trade or business on her sole and separate account, do not deprive a husband of his common law right to regulate and control his own household. He has the power to prevent his wife from using his house for an illegal business or purpose. If he permits her to use it for the illegal business of keeping intoxicating liquors for the purpose of sale, he becomes a participator in the misdemeanor, and is liable to an indictment or complaint for it. And the fact that she was carrying on the business on her own account, and has filed a certificate to that effect under the statute, does not release him from this liability. *Commonwealth v. Wood*, 97 *Mass.* 225.

SECTION XV.

Post-nuptial Torts of Wife.

McQUEEN v. FULGHAM.

1864. 27 Texas, 463.¹

ACTION of slander, by Narcissa J. Fulgham, against Sarah McQueen and her husband, Milton McQueen, for words spoken by Sarah.

Milton McQueen demurred generally in a separate answer. His demurrer was overruled.

Defendants alleged that the defendant Sarah owned and possessed in her own right, and separate from her husband, real estate and slaves together with a large amount of personal property, the same being ample to respond in damages over and above the amount claimed by the plaintiff.

Verdict for plaintiff, and judgment thereon against both defendants. A new trial having been refused, the defendants appealed.

E. B. Pickett and *T. Rock*, for appellants.

H. N. & M. M. Potter and *Cleveland*, for appellee.

MOORE, J. It is an undeniable proposition, that at common law the husband is a necessary party in an action for slander by the wife, as well as other torts. (1 Chit. Pl. 92; 2 Kent, 149; *Hanks and wife v. Harman and wife*, 5 Binn. 43.) And it has been held that he may be sued alone in such case. (*Hasbrouck v. Weaver*, 10 John., 247.) It is insisted, however, that the common law doctrine upon this subject is abrogated in this State by our statutes regulating marital rights. With us the separate identity of the wife, with respect to her property, is not merged in the husband. Her property is not vested in him by marriage. But the common law rule holding the husband responsible for the wife's torts, does not rest entirely upon the ground that he takes by marriage all of her personal property, and that she is presumed to have no separate estate. It rests perhaps mainly upon the supposition that her acts are the result of the superior will and influence of the husband. Owing to the intimate relation between husband and wife, and to the nature of the control given him by law and social usage, over her conduct and actions, it would be difficult, if not impossible, for the courts to determine when she had acted at her own instance, and when she was guided by his dictation. While our statutes are framed with the view of securing to the wife her separate property, and of sedulously protecting her with reference to it, against the recognized and controlling influence of the husband over her conduct, it would be a stretch of judicial authority to hold that the common law responsibility attaching

¹ Only so much of the report is given as relates to a single point. — ED.

to him for the acts of the wife, is by mere implication abolished. We see, therefore, no objection to the prayer of the petition for a general judgment, and think the general demurrer was properly overruled. Whether the judgment in such cases should not be so framed as to require, in the first instance, satisfaction from her separate estate, or the community property, before resorting to the separate property of the husband, as no exception has been taken to the form of the judgment, need not at present be discussed.

[Opinion on other points is omitted].

SEROKA AND WIFE v. KATTENBURG AND WIFE.

1886. *Law Reports. 17 Queen's Bench Division, 177.*

ACTION for libel and slander of the female plaintiff by the female defendant. The cause of action arose after the passing of the Married Women's Property Act, 1882.¹

The defendant Leman Kattenburg, the husband, who pleaded separately, raised in his defence an objection that the statement of claim disclosed no cause of action against him, inasmuch as it was not alleged that he spoke, wrote, published or caused to be spoken, written, or published the defamatory words, and that he was not liable for words spoken, written, or published by his wife or by her caused to be spoken, written, or published, and that he was not a necessary or proper party to the action.

The objection was heard by order as an opposed motion.

Herbert Reed, for the defendant. Before the Married Women's Property Act, 1882, a husband was properly joined as a co-defendant in an action for a tort committed by his wife, the sole reason being that, as all her personal property was vested during coverture in her husband, he must necessarily be joined for conformity. *Capel v. Powell*, 17 C. B. (N. S.) at p. 748; *Wright v. Leonard*, 11 C. B. (N. S.) at p. 266. The effect of the Act of 1882 is to make the whole of a married woman's personal property her separate estate, and so to make her a feme sole for the purpose of suing and being sued. An action against husband and wife for the tort of the wife must have been concluded during their joint lives: *Wright v. Leonard*, 11 C. B. (N. S.) 258; but now husband and wife are for many legal purposes two distinct persons, and the effect is the same as though for those purposes

¹ By s. 1, sub-s. 2, of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), "a married woman shall be capable of . . . suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a feme sole, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her . . . and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property and not otherwise."

the marriage had been dissolved. By the Act of 1882 the wife is made capable of being sued alone for her torts; the sole ground therefore of the husband's previous liability is removed.

[A. L. SMITH, J. Secs. 14 and 15 of the Act of 1882 contain a limitation of the husband's liability for his wife's torts committed before marriage; but there is no limitation to his liability for those committed by her during coverture.]

That is so; but a married woman may sue alone for a tort committed before the Act of 1882 came into operation. *Weldon v. Winslow*, 13 Q. B. D. 784; and conversely she should be sued alone for her torts.

J. J. Sims, for plaintiffs. The words of the section are "need not be joined," and the Act was only intended to leave it optional with a plaintiff to sue the wife alone or to join the husband as a co-defendant. The reason that a husband was necessarily joined as a defendant in an action for torts committed by his wife was that a married woman could not alone commit a tort, she and her husband being one; her torts were torts of her husband. *Wainford v. Heyl*, Law Rep. 20 Eq. 321. This Act does not abolish the old practice of joining the husband as a defendant, nor does it do away with the reason for joining him; there is nothing in it to relieve him of his common law liability for wrongs committed by his wife during coverture. The provision in s. 1, sub-s. 2, that "any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property and not otherwise," is only applicable to those cases where the plaintiff has elected to sue the wife alone.

Herbert Reed, in reply.

MATHEW, J. I am of opinion that the husband is liable to be joined as a defendant in this action. It is agreed that before the passing of the Married Women's Property Act of 1882, a husband must have been joined as defendant in an action brought against the wife for a tort committed by her; but it is said that that Act altered the law in this respect. Now, if this construction is right the statute in question is an Act for the relief of husbands, and not an Act affecting the property of married women. Why is this effect attributed to it? It is said that since the passing of the Act whatever the wife earns is her own property and is made a fund for the discharge of her liabilities, whether in tort or contract; and that therefore it is only fair that the husband should be discharged from his liability for the torts of his wife. But if we look at the terms of the Act it appears impossible to put such a construction upon it; sub-s. 2 of s. 1 is an enabling clause, and appears to give the option of suing the wife where she has separate property, and there is a chance of the plaintiff being able to enforce a judgment against her; while in cases where there would be no chance of enforcing judgment against the wife, the husband is left subject to his old common law liabilities. The words of the section are "need not be joined," but they do not discharge the husband from his old liability; they are intended to give to a plaintiff the option of suing

husband and wife together or suing the wife alone ; judgment may be entered against the wife and execution issued against her separate property, if she has any ; but where she has none, the plaintiff is entitled to add the husband as a co-defendant.

A. L. SMITH, J. I am of the same opinion. The Act of 1882 is primarily an Act consolidating and amending the law relating to the property of married women. It contains two very remarkable sections, the 14th and 15th, in relief of the husband, but it has no section relieving him from liability for wrongs done by his wife after her marriage. This clearly shows that it is an Act in favour of the wife, and does not affect the liability of the husband except in those instances where there is a specific limitation in his favour.

Judgment for the plaintiffs.

NORRIS v. CORKILL.

1884. 32 *Kansas*, 409.¹

ACTION against husband and wife for slander alleged to have been uttered by the wife.

The husband demurred to the petition. The District Court sustained the demurrer, and dismissed the case as to the husband. Plaintiff brought error.

G. W. C. Jones and *O. H. Bentley*, for plaintiff in error.

Stanley & Wall, for defendants in error.

HORTON, C. J. The question presented in this case is, whether the husband is liable for the slanderous words spoken by his wife when he is not present and in which he in no manner participates. The rule of the common law makes the husband liable for the torts of his wife committed during coverture. The reason assigned for this liability is, that the husband is entitled to the rents and profits of the wife's real estate during coverture, and to the absolute dominion over her personal property in possession. Another ground of this liability at common law, sometimes given, is that the wife, by her marriage, is entirely deprived of the use and disposal of her property and can acquire none by her industry ; that her person, labor and earnings belong unqualifiedly to the husband. (Reeves's Domestic Relations, 3 ; Tyler on Infancy and Coverture, § 233.)

Again, the husband by common law might give the wife moderate correction, for, as he was to answer for her misbehavior, the law thought it reasonable to intrust him with this power of restraining her by domestic chastisement in the same moderation that a man is allowed to correct his apprentices or children, for whom the master or

¹ Statement abridged. — Ed.

parent is also liable in some cases to answer. (1 Blackstone's Com., Wendell's ed., 444, 445.)

Under the provisions of our statute, the reasons assigned for the liability of the husband for the torts of his wife no longer hold good, and therefore, in our opinion, under the changes made by the statute, the liability no longer exists. It is a part of the common law that where the reason of the rule fails, the rule fails with it.

At common law the husband had control almost absolute over the person of the wife; he was entitled, as the result of their marriage, to her services, and consequently to her earnings; to her goods and chattels; had the right to reduce her choses in action to possession during her life; could collect and enjoy the rents and profits of her real estate, and thus had dominion over her property and became the arbiter of her future. She was in a condition of complete dependence; could not contract in her own name; was bound to obey him, and her legal existence was merged in that of her husband, so that they were termed and regarded as one person in law. (*Martin v. Robson*, 65 Ill. 129; Tyler on Infancy and Coverture, ch. 19, §§ 216-233.)

Under the statute,

"The property, real and personal, which any woman in this state may own at the time of her marriage, and the rents, issues, profits or proceeds thereof, and any real, personal or mixed property which shall come to her by descent, devise, or bequest, or the gift of any person except her husband, shall remain her sole and separate property, notwithstanding her marriage, and not be subject to the disposal of her husband or liable for his debts." (Comp. Laws of 1879, ch. 62, § 1.)

"A married woman, while the marriage relation subsists, may bargain, sell and convey her real and personal property, and enter into any contract with reference to the same, in the same manner, to the same extent and with like effect, as a married man may in relation to his real and personal property." (§ 2 of ch. 62, *supra*.)

"Any married woman may carry on any trade or business, and perform any labor or services, on her sole and separate account; and the earnings of any married woman from her trade, business, labor, or services, shall be her sole and separate property, and may be used and invested by her in her own name." (§ 4 of ch. 62, *supra*.)

In addition, § 3 of said chapter provides that a woman may, while married, sue and be sued in the same manner as if she were unmarried. Therefore it is not true, under the existing statute, that the wife, by her marriage, is deprived of the use and disposal of her property; nor is she prohibited from acquiring property by her own industry. It is not true under the statute, that the personal property of the wife passes to the husband; nor is he entitled to the rents and profits of her real estate during coverture; nor has he any dominion over her personal property, her labor, or her earnings. If she so desires, they are unqualifiedly her own, and he cannot interfere with them.

Again, in this state, the common-law power of correction of the wife

by the husband is no longer tolerated. Under the common law, the married woman's legal existence was almost entirely ignored. She was sunk into almost absolute nonentity, and rested in almost total disability; but all of this has been changed by the statute, and to-day in our state, "her brain and hands and tongue are her own, and she should alone be responsible for slanders uttered by herself." (*Martin v. Robson, supra.*) Our conclusion is that the provisions of our statute change the common-law rule, and thereby discharge the husband from liability for the torts of the wife committed when he is not present and with which he has no connection. In this state the wife stands upon an equality, in all respects, with the husband. She is alone responsible for her contracts, and should be alone responsible for her words and her acts.

We have examined the various authorities conflicting with these views, but owing to the provisions of our statute we are not inclined to follow them, and therefore think it unnecessary to refer to them.

The judgment of the district court will be affirmed.

SECTION XVI.

Tortious Damage to Wife, or to Husband's Right in Wife.

HARRIS AND WIFE v. WEBSTER AND WIFE.

1878. 58 *New Hampshire*, 481.

CASE, for slanderous words spoken of Mrs. Harris by Mrs. Webster. The defendants demurred.

Putnam and Bingham & Mitchell, for the plaintiffs.

Carpenter, for the defendants.

FOSTER, J. By the doctrine of the English common law, husband and wife have always been required to sue jointly for injuries to the person or character of the wife, committed during coverture. Dicey on Parties, 389; 1 Ch. Pl. 73. The wrongful act—for example, an assault upon the wife—may involve two distinct wrongs, and afford two distinct causes of action. The first is the assault upon the wife; and the second is the damage occasioned thereby (through loss of service) to the husband. The husband cannot sue alone merely for the injury done to the wife, but he may sue alone for the damage occasioned thereby to himself. In like manner, at common law, in an action for the slander of the wife, if the words are actionable *per se*, the husband and wife must join in a suit for the direct injury to her (*Dengate v. Gardiner*, 4 M. & W. 5), but the husband must sue alone for consequential damage to him; and so also if the words are not actionable in themselves, but only because they cause damage to the husband, he must sue alone; the wife cannot join. Dicey on Parties, 391, 392. So, also, at common law, husband and wife must be sued jointly for all torts committed by the wife during coverture, unless the tort be committed in the presence and by the direction of the husband, in which case he alone is liable. Dicey on Parties, 476; 1 Starkie on Slander, 349; 1 Ch. Pl. 93; *Carleton v. Hayward*, 49 N. H. 314.

At common law the wife alone can neither sue nor be sued. The reason of this is founded upon the general doctrine of conjugal union expressed by “the father of the English common law,” in the emphatic and sacred phrase, “Man and wife are the same flesh.” *Sunt idem corpus et eadem caro, vir et uxor*. Bracton, f. 31. *Sunt quasi unica persona, quis caro una et sanguis unus*. Bracton, f. 430. And herein, says an old writer, “The common law shaketh hands with divinitie”—an illustration of the habit of presenting every established fact which is too bad to admit of any other defence, as an injunction of religion. Mill on the Subjection of Women, 84. All persons are either free or serfs. Also some are under the rod (*sub virga*), as wives, &c. Bracton, f. 46.

“By marriage, husband and wife become one person in law; that is, the very being or legal existence of the wife is suspended during the

marriage, or, at least, is incorporated and consolidated into that of the husband, under whose wing, protection, and cover she performs everything; and is therefore called in our law-French, a *feme-covert*, *foemina viro co-operta*; is said to be *covert-baron*, or under the protection and influence of her husband, her *baron* or lord; and her condition during her marriage is called her *coverture*. . . . For this reason a man cannot grant anything to his wife, or enter into covenant with her, for the grant would be to suppose her separate existence; and to covenant with her would be only to covenant with himself." 1 Bl. Com. 442. "It is a well established maxim of the law, that husband and wife are one person. For many purposes, this is a mere figure of speech; for other purposes, it must be understood in its literal sense." LUSH, J., in *Phillips v. Barnet*, L. R. 1 Q. B. D. 436, 440.

By the common law, the married woman's contracts were absolutely void,—not merely voidable, like those of infants and lunatics; and this, not because of the theory that, like an infant or a lunatic, she required the protection of the law (for, in legal theory, a wife needed the protection of the law no more than a single woman), but because of the theory of the utter absorption of the existence of the wife in that of the husband; or the other theory, of her subjection and slavery. Both theories compelled the same practical result: her legal personality was extinguished, and her social personality was that of a slave, "under the rod." The social condition and legal status of woman was the natural condition of the age of feudalism which produced it—an age when every social relation was governed by feudal analogies. It is not surprising, therefore, that in such an age a theory of conjugal life should have gained ground in England which seemed to reproduce at every fireside the bond of lord and vassal, and to place the lord in the attitude of Petruccio:

"I will be master of what is mine own :
She is my goods, my chattels ; she is my house,
My household stuff, my field, my barn,
My horse, my ox, my ass, my anything."

Kenny on Married Women's Property, 8.

The wife being thus *sub potestate viri*, with the sanction of the law and of public opinion, the law was consistent in holding that "if a man beat an outlaw, a traitor, a pagan, his villein or his wife, it is dispunishable, because, by the law common, these persons can have no action." BROOKE, J., 12 Hen. VIII. 4. And the woman being thus utterly within her husband's control, his chattel, his "ox," he became personally and solely answerable for her torts, as for the trespasses of his other domestic cattle; and, of course, the law could pursue no other consistent system than that which declared all her contracts absolutely void.

Such was the social and legal status of a married woman centuries ago; and the change of her condition before the law seems to be much less in England than in New Hampshire. *Phillips v. Barnet*, before cited.

But feudalism exists no longer, and the social and legal conditions which the system produced have likewise passed away. The benign influences of Christianity, and a more diffused as well as a higher system of moral and intellectual education, have gradually ameliorated the hardships of woman's social condition, and have elevated her to the state of dignity and importance she possesses to-day—a social position of honor and respect. The change has been gradual, but it has been as marked as any other step in the course of advancing civilization, for it has been nothing less than a slow but steady march from slavery to freedom. It has been uniform in one respect; “Through all its course it has been distinguished by the gradual dissolution of family dependency, and the growth of individual obligation in its place.” Maine's Ancient Law, 163.

The movement has been “from *status* to *contract*.” 18 Alb. Law J. 26. And if it be true, as maintained by Spencer, that in the United States “women have reached a higher status in the social structure than anywhere else” (1 Principles of Sociology, 764), it is equally true that in many of the states, certainly in New Hampshire more than anywhere else, have the legal distinctions between the sexes been swept away.

The law of servitude in marriage is repealed in this state. In 1842 the Revised Statutes empowered a deserted wife to hold and convey property without the interference of her husband. Rev. St. c. 149, s. 1. Successive steps in the direction of a larger liberty and a corresponding responsibility, through the legislation of 1845 (Laws, c. 236), of 1846 (Laws, c. 327), of 1857 (Laws, c. 1960), of 1858 (Laws, c. 2073), of 1860 (Laws, c. 2342), of 1865 (Laws, c. 4080), of 1866 (Laws, cc. 4234, 4252), of 1867 (Gen. St. c. 164, s. 1), of 1869 (Laws, c. 35), of 1871 (Laws, c. 27), and perhaps other enactments not at this moment called to mind, resulted finally in the act of 1876 (Laws, c. 32). As the result of all this legislation, it is now settled that a wife may hold to her own use, free from the interference or control of her husband, all property at any time earned, acquired, or inherited by, bequeathed, given, or conveyed to her, either before or after marriage, and may make contracts, and may sue and be sued in all matters, whether in law or in equity, in the same manner as if she were sole and unmarried. Thus by progress in the same direction, by changes religious, social, customary, legislative, and judicial, the rule of the common law has been abolished and obliterated; and it is no longer possible to say that in New Hampshire a married woman is a household slave or chattel, or that in New Hampshire the conjugal unity is represented solely by the husband. By custom and by statute the wife is now joint master of the household, and not a slave or a servant. The rule now is, that her legal existence is not suspended. So practically has the ancient unity become dissevered and dissolved, that the wife may not only have her separate property, contracts, credits, debts, wages, and causes of separate action growing out of a

violation of her personal rights, but she may enter into legal contract with her husband and enforce it by suit against him. *Clough v. Russell*, 55 N. H. 279. And since the wife's property is no longer her husband's, nor her earnings his, by mere force of law, and since he has no more legal power of physical control over her than she has over him, no more reason seems to remain for holding him liable for her torts than for holding her liable for his. And there remains "not a reason, nor the semblance of a reason, growing out of the condition and wants of society, the progress of civilization, the exigencies of trade, or the analogies of the law," why the rules and forms adapted to a condition which has ceased to exist, and inapplicable to the conditions which have succeeded, should be longer retained. *Cessante ratione legis, cessat ipsa lex*. *Hammond v. Corbett*, 50 N. H. 501, 507; *Cole v. Lake Co.*, 51 N. H. 242, 279, 285.

Why, then, should the husband of Mrs. Harris be joined in this suit as a party plaintiff, any more than any stranger? None of his legal rights have been invaded by the act of Mrs. Webster; and, since his wife is entitled to hold to her separate use the fruits of the judgment that may be rendered in this action, he can have no right to or interest in the damages which may be recovered.

And why should the husband of Mrs. Webster be joined in this suit as a party defendant? He has done no wrong, and neither he nor his property can be holden for any damages or costs which may be recovered. We are unable to discover any reason why the husband of either party should be permitted to interfere in this controversy, except so far as to persuade his wife to cease litigation. Under recent statutes, antecedent to the law of 1876, it has been held that a husband could not properly be joined as plaintiff in a suit to recover his wife's earnings, nor in an action to recover a debt which accrued to his wife before marriage, nor in a writ of entry to recover possession of her land, nor in an action for trespass upon her estate; and, as we have seen, in matters pertaining to her own property, she may sue her husband and be sued by him. *Albin v. Lord*, 39 N. H. 196; *Bunk v. Clark*, 46 N. H. 134; *Whidden v. Coleman*, 47 N. H. 297; *Cooper v. Alger*, 51 N. H. 172; *Alexanders v. Goodwin*, 54 N. H. 423; *Clough v. Russell*, 55 N. H. 279; *Cahoon v. Coe*, 57 N. H. 556. The statute of 1876 is so broad and sweeping in its terms as to preclude the supposition that it could have had reference to matters of contract only.

We are therefore of the opinion, that, as at common law, so no less under the operation of the statute, the rule of pleading must prevail, which requires that an action at law must be brought in the name of the party whose legal right has been affected, against the party who committed or caused the injury (1 Chitty Pl. 1; Dicey on Parties, 380-382); that the husbands of these female parties are strangers, in law, to this proceeding, and that the demurrer should be sustained.

Case discharged.

CLARK, J., did not sit.

JOHNSON AND WIFE v. BALTIMORE & POTOMAC R. CO.

1887. 17 *District of Columbia* (6 *Mackey*), 232.¹

HAGNER, J. This action was brought to recover damages for injuries sustained by the female plaintiff, from a collision on the defendant's road, in May, 1884, at Sheriff's Crossing, where the Anacostia City road crosses the railroad. She was driving home from the Washington market in a wagon drawn by one horse; and in attempting to pass over the track, the horse was struck and killed by a freight train coming from Washington, the wagon destroyed, and the plaintiff thrown out and severely injured. The plaintiffs charged negligence against the defendant company, which, in turn, ascribed the collision to contributory negligence on the part of the female plaintiff. The jury found a verdict of \$1,500 against the company; and the case comes before us upon numerous exceptions to the rulings below.

[Omitting opinion on various exceptions.]

The next objection relates to the correctness of the direction of the Court upon the question of damages. The Court used this language: "I am requested further to instruct you as to the measure of damages in case you find that the plaintiff is entitled to recover anything. I do instruct you, as requested, that in estimating the damages the suffering of the plaintiff may be considered, and you may allow such damages as would compensate her for her suffering and for the effect of the injuries which you are satisfied will be permanent, and for the sufferings that must necessarily result, in the future, from the injuries; so that she will be fully compensated for all the consequences of accident."

It is insisted that the words "and for the effect of the injuries which you are satisfied will be permanent," describe a class of injuries that could be recovered in a separate action by her husband alone; because they could only diminish the value of the wife's *personal services* in the future, which belong exclusively to her husband.

But if this would be the proper construction of the words standing alone, yet in connection with the rest of the sentence it is plain the justice was referring only to the effect of permanent injuries upon the wife alone, and the suffering to her from such injuries in the matter; and that he meant to say it was for such suffering, either past or necessarily to come, that she should be compensated. The cases cited by the defendant's counsel in support of his objection were decided under special State statutes which prevent their general application.

¹ Argument omitted. Only so much of the report is given as relates to a single point. — ED.

In *Scott v. Metropolitan Railroad Company*, 4 Mackey, 153, the Court below had previously warned the jury that the plaintiff could not recover anything as damages or compensation for the loss of services of the wife to the husband (which was omitted in the present case); but the General Term held that it was error in the Court to say further that they might recover for such injury continuing to the time of the trial "so as to diminish her physical strength or ability to perform or transact her necessary affairs and business," as the evidence showed she was a washerwoman by occupation, and her savings as such belonged to her husband; and that the jury might therefore have been misled by the instructions as thus given. In the present case, also, it was proved that the wife worked on a market garden farm, and took the crops to market and sold them there.

But we think there is great good sense in the language of the Court in *Minick v. Troy*, 19 Hun, 253, where it was held that in an action by a married woman, she may recover for such loss of services as she herself sustained towards herself; and that there remain to a married woman many duties, privileges and services personal to herself, which are proper subjects for the consideration of the jury, in connection with the suffering endured, in determining the damages to be awarded to her. See 3 Sutherland, Damages, 729, note.

The testimony here shows that among other injuries sustained by the female plaintiff, her jaw bone was broken and ten teeth knocked out, so that she has not been able since to masticate solid food; and her shoulder was so injured that she has not been able since to dress herself, without assistance. This testimony shows a loss of service "sustained by herself, and towards herself," which might properly be the subject of recovery by the wife. It would be ascribing to the jury too dense a capacity for being misled, to conclude that they supposed the Court told them to include in their verdict compensation to the husband for his loss of the labor and services of his wife, belonging to him alone, when they had been told throughout that it was she who was to be compensated and for her suffering from the accident. Nor is there anything so unreasonable in the amount of the verdict as to suggest that such extraneous considerations influenced the act of the jury.

MEWHIRTER v. HATTEN.

1875. 42 Iowa, 288.

THE plaintiff brings this action against the defendant, a physician and surgeon, for malpractice in the treatment of Hannah Mewhirter, plaintiff's wife, during her confinement giving birth to a child, whereby it is alleged she has sustained serious injuries and been permanently disabled in body.

The petition among other things states that the plaintiff has been compelled to pay out and expend large sums of money in caring for and doctoring his wife and has been, and will during her natural life, owing to the injuries caused by the negligence of the defendant, be deprived of the physical labor and assistance of his said wife to the great damage of the plaintiff, etc.

The defendant filed a motion to strike out of the petition the statement that plaintiff had been, and would, during the life of his wife, be deprived of her labor and assistance, as being immaterial. The court sustained the motion, and the plaintiff standing upon his pleading, the court rendered judgment for defendant for costs. Plaintiff appeals.

Montgomery & Scott, for appellant.

The husband may maintain an action for consequential injuries to himself growing out of an injury to the wife. (*Musselman v. Galligher*, 32 Iowa, 383.) It is against public policy to permit actions between husband and wife for payment for the performance of domestic duties. (*Diver v. Diver*, 56 Penn. 109; *Longendyke v. Longendyke*, 44 Barb. 366; *Perkins v. Perkins*, 62 id. 531.)

C. E. Richards and Brown & Churchill, for appellee.

An injury inflicted upon the person of the wife, depriving her of the power and ability to perform that personal labor of which by statute she is made the sole owner, gives to her and her alone, the right of action for the loss sustained. (*Musselman v. Galligher*, 32 Iowa, 383; *Pancoast v. Burnell*, id. 394; *Stephens v. Kula*, 36 id. 563; *C., B. & Q. R. Co. v. Dunn*, 52 Ill. 260.)

MILLER, C. J. The question presented for decision is, whether a married man is entitled to the personal labor and assistance of his wife to any extent whatever, so as to be entitled to maintain an action against one who, by injuries committed upon her, deprives him of such labor and assistance.

By the common law the husband was entitled to the labor and earnings of the wife and to all property and money acquired as the fruits of such labor or earnings. *Duncan v. Rosselle et al.*, 15 Iowa, 501; *Laing v. Cunningham*, 17 id. 510. The common law, however, has in this respect been modified by our statutes. How far the modification extends we will proceed to inquire. The Code provides as follows:

“Section 2202. A married woman may own in her own right real

and personal property acquired by descent, gift, or purchase, and manage, sell, convey, and devise the same by will, to the same extent and in the same manner that the husband can property belonging to him."

"Section 2211. A wife may receive the wages of her personal labor and maintain an action therefor in her own name and hold the same in her own right; and she may prosecute and defend all actions at law and in equity for the preservation and protection of her rights and property, as if married."

"Section 2212. Neither husband nor wife is liable for the debts or liabilities of the other incurred before marriage, and, except as herein otherwise declared, they are not liable for the separate debts of each other; nor are the wages, earnings, or property of either, nor is the rent or income of such property liable for the separate debts of the other."

"Section 2562. A married woman may in all cases sue and be sued without joining her husband with her, to the same extent as if she were unmarried, and an attachment or judgment in such action shall be enforced by or against her as if she were a single woman."

We have held under the Revision of 1860, which contained substantially the above provisions, that a married woman may maintain an action in her own name for an injury to her person or reputation; that for such injury a right of action accrues to her which is her own separate property, and that in an action for such injury her husband cannot be joined. *Musselman v. Galligher*, 32 Iowa, 383; *Pancost v. Burnell*, id. 394. Appellee, therefore, insists that since the husband cannot be joined in an action with the wife for the recovery of her property, he has no right to sue separately for an injury to her, which it is claimed is exclusively the property of the wife, and it is claimed also that such is the effect of the holding in the cases referred to. It is also insisted by counsel for appellee that under section 2211 of the Code, above set out, the husband is in no degree entitled to, and has no claim upon, the personal labor or assistance of the wife; that this is her own separate property, and that he cannot therefore join with her in an action therefor.

In the case of *Musselman v. Galligher*, *supra*, the language of the opinion is clear and explicit that, in the right of action which accrues to the wife for the direct injury to her, the husband has no interest, that she alone must sue thereon, but that this does not preclude the husband from maintaining an action for the consequential injuries suffered by him, nor that these are merged in the right of action which accrues to the wife. If the husband be entitled to the assistance or labor of the wife in any degree, then to deprive him of such assistance or labor by a direct injury to the wife, which renders her incapable of rendering such assistance or labor, is an injury to the husband for which he may maintain his action. This brings us to consider and determine whether or not, under section 2211 above, the husband is

entitled to the labor or assistance of his wife. That section provides that the "wife may receive the wages of her personal labor and maintain an action therefor in her own name, and hold the same in her own right." We think that the terms, "wages of her personal labor," as here used, refer to cases where the wife is employed to some extent in performing labor or services for others than her husband, or where she is carrying on some business on her own behalf; such, for instance, as dress-making, or the millinery business or school-teaching. In a word, she is entitled to the wages for her personal labor or services performed for others, but her husband is entitled to her labor and assistance in the discharge of those duties and obligations which arise out of the married relation. We feel very clear that the legislature did not intend by this section of the statute to release and discharge the wife from her common law and scriptural obligation and duty to be a "help-meet" to her husband. If such a construction were to be placed upon the statute, then the wife would have a right of action against the husband for any domestic service or assistance rendered by her as wife. For her assistance in the care, nurture and training of his children, she could bring her action for compensation. She would be under no obligation to superintend or look after any of the affairs of the household unless her husband paid her wages for so doing. Certainly, such consequences were not intended by the legislature, and we cannot so hold in the absence of positive and explicit legislation.

In the recent case of *Grant v. Green*, 41 Iowa, 88, which was an action by a wife against the administrator of her deceased husband's estate, for services rendered in taking care of her husband in his lifetime during a period of his insanity, it was held that she could not recover for such services, notwithstanding she had been employed by the guardian of her insane husband to perform them. It is there held that it is the right and duty of husband and wife to protect and care for each other in case of sickness or insanity. These and like services arising out of the married relation are to be rendered in conformity with the mutual obligations which have been assumed in entering into that relation, and are not such as have "wages" attached thereto, within the meaning of the statute. When the wife performs labor or services for others for which wages accrue, such wages are her own separate property, but for labor performed and assistance rendered in the discharge of her domestic duties as a wife no wages, in the proper meaning of that term, attach or follow. Both husband and wife have in their marriage vows bound themselves to the discharge of their respective duties toward each other, for which no wages as such are due. These duties being mutual, their discharge by the parties constitute the only compensation contemplated by law.

In *Peters v. Peters*, decided at the present term, it was held that the wife could not maintain an action against her husband for an assault and battery. It is there said that, "whilst it must be admitted that very radical changes have been made in the relation of husband

and wife, still it seems to us that these changes do not yet reach to the extent of allowing either husband or wife to sue the other for a personal injury committed during coverture." It seems to us, also, that these changes have not transformed the wife into a hired servant, or established the law to be that the husband, when prostrated on a bed of sickness, will not be entitled to the tender care and watchfulness of his wife, unless he has the ability and expects to pay her wages therefor. These duties are mutual and reciprocal and essential to the harmony of the marital relation. To abrogate these duties, or remove the mutual obligations to perform them, would be to dissolve that relation and establish that of master and servant.

We are of opinion that the court erred in sustaining the defendant's motion to strike out, and the judgment must be

Reversed.

RILEY v. LIDTKE.

1896. 49 *Nebraska*, 139.

ERROR from the district court of Saunders county. Tried below before WHEELER, J.

Clark & Allen, for plaintiff in error.

Frank Dean and W. D. Guttery, *contra*.

RAGAN, C. Herman Lidtke sued Pat Riley in the district court of Saunders county for damages. Lidtke alleged in his petition that on the 14th of March, 1890, while his wife was driving south in a carriage upon a public highway in said county, at a place where it was practicable, from the nature of the ground, for the driver of a carriage to turn to the right of the beaten track, she met Riley driving north on the highway in a carriage, and that he negligently neglected to turn his team to the right of the center of the road and the center of the beaten track thereof; the carriages of the two parties collided and his, Lidtke's, wife was thrown from her carriage, permanently injured, and by reason of the injuries had become an incurable invalid and unable to perform her work and duties as a wife, whereby he had been deprived of her services and companionship and put to great expense for her medical treatment, nursing, and medicines, to his damage. Lidtke had a verdict and judgment, to reverse which Riley has prosecuted here a petition in error.

On the trial to the jury Lidtke's wife, against the objection of Riley, was permitted to testify as follows:

Q. What was your occupation prior to the time of the injury, aside from housekeeping?

A. Making dresses.

Q. What did you do with your earnings from that labor?

A. I used them for my household.

Q. Then your earnings were not kept apart from your husband; you made a common interest?

A. No.

Q. Do you mean to say that you and your husband kept everything in common for the general good of the family?

A. Yes, sir.

Q. About what were your annual earnings from that source, Mrs. Lidtké, or say your weekly earnings?

A. Outside of the household, about \$3 a week.

Mrs. Lidtké was also permitted, over the objection of Riley, to testify that prior to her injury she had been in the habit of doing laundry work for other families than her own, by which labor she earned about \$1 per week, and that her earnings from this source were also applied to the support of her family.

Section 4, chapter 53, Compiled Statutes, provides: "Any married woman may carry on trade or business and perform any labor or services on her sole and separate account; and the earnings of any married woman from her trade, business, labor, or services shall be her sole and separate property, and may be used and invested by her in her own name." Lidtké's claim for damages in this action is based upon his contention that he had, through the injury of his wife, been deprived of her services and companionship and been put to expense in furnishing her nursing and medical treatment. By virtue of the provisions of the statute just quoted Lidtké was not entitled to what his wife earned as laundress or seamstress. By virtue of the marital relation a husband is entitled to such ordinary household services as his wife may render, and if, through the negligence of another, the wife be injured and thereby unable to perform her household duties, and her husband is put to expense in having these duties performed by another, he may recover such necessary expense from the party inflicting the injury. But by virtue of the statute quoted above a husband is not entitled to what his wife may earn as a seamstress or laundress. The earnings of Mrs. Lidtké derived from those services were her sole and separate property, and the court erred in permitting this evidence, as it left the jury at liberty to take into consideration the amount of such earnings in fixing the damages the husband had sustained. By admitting this evidence the court, in effect, told the jury that the earnings received by Mrs. Lidtké as a seamstress or laundress belonged to her husband. The statute quoted above does not deprive the husband of his right of action for the loss of the services of his wife, but such services do not include sewing and washing for other than the husband's family. The services which are due to the husband from his wife, and for the loss of which he may recover, are such duties and services as reasonably devolve upon her by reason of the marriage relation. (*Omaha & R. V. R. Co. v. Chollette*, 41 Neb. 578). The fact that Mrs. Lidtké, prior to her injury, had been accustomed to apply her earnings as a seamstress and laundress towards the support

of her and her husband's family — that is, that she had been accustomed to give such earnings to her husband — did not make the evidence competent. To do laundry work and sewing for others than her own family was not a duty which was owing to her husband by reason of the marriage relation, and she might at any time cease to perform such labors without neglecting her duties as a wife. Had she been uninjured and continued to do laundry work and the work of a seamstress, she was under no legal obligation to continue to apply the earnings from those sources towards the support of her husband and family. The law presumes that a wife performs the duties and renders the services towards her family which grow out of the marriage relation, and that she will continue to do so, but because a wife at one time gives to her husband for the support of the family the earnings which she derives from the performance of duties outside of those devolving upon her by reason of the marriage relation, the presumption cannot, therefore, be indulged that she will continue to do so. For the error of the court in admitting the evidence quoted above, this judgment is reversed and the cause remanded.

*Reversed and remanded.*¹

LYDIA W. HARMON v. OLD COLONY R. R. CO.

1896. 165 *Massachusetts*, 100.²

TORT, for personal injuries occasioned to the plaintiff, while a passenger on the defendant's railroad, by the alleged negligence of the defendant. The declaration alleged that the plaintiff "has been wholly unable to attend to her business, which said business was that of keeping a restaurant, and was carried on under a license therefor solely by said plaintiff, who was then and there solely entitled to the profits of said business, and to her labor and services in connection therewith, or in any capacity connected with the business of keeping a restaurant, separate and unconnected with her husband, since February 29, 1892, the day of her injuries, is not able to attend to the same now, and is incapacitated from so doing in the future, and has thereby suffered great loss and damage in her business."

At the trial in the Superior Court, before HOPKINS, J., the plaintiff testified that she was a married woman, and, at the time of the accident, was engaged in keeping a restaurant in Boston, and had been engaged in a similar business for many years previously. The plaintiff put in evidence a copy of a certificate, dated September 16, 1891, and duly recorded in the office of the city clerk of Boston, that she was a married woman, and was doing and proposed to do business on her separate account.

¹ [Compare *Blaechinska v. Howard Mission*, ante, p. 529. — Ed.]

² Statement abridged. — Ed.

Plaintiff offered evidence tending to show the value of her services in her separate business; and the loss resulting to her from inability to carry on the business; such inability being due to the injuries received on the railroad. The evidence was excluded, and plaintiff excepted.

Upon the question of damages the judge instructed the jury, in substance, as follows:

It cannot be said that a married woman is entitled to recover for the same elements of damage as a man may recover for. The probability that a married woman will earn any given sum of money in the future of any event is too remote and uncertain to be relied upon as an element in the estimation of damage. You will exclude from your consideration all speculations suggested by the evidence, or otherwise, as to any loss of time resulting to this woman from this accident, or any loss of capacity to perform labor or to carry on business. You will come to the simple question of what is the loss to her, what would compensate her for the mental and physical pain she has endured, which carries and involves in it an inquiry as to her loss of capacity to enjoy life.

The jury returned a verdict for the plaintiff in the sum of \$2,200; and the plaintiff alleged exceptions.

A. A. Strout & G. E. Smith, for the plaintiff.

J. H. Benton, Jr. & C. F. Choate, Jr., for the defendant.

ALLEN, J. The general question arising in this case is, whether, in an action brought by a married woman to recover damages for a personal injury, the impairment of her capacity to perform labor can be considered as an element of the damages.

By St. 1846, c. 209, § 1, it was enacted that, "In all cases where married women shall hereafter, by their own labor, earn wages, payment may be made to them for the same."

This was followed by St. 1855, c. 304, § 7: "Any married woman may carry on any trade or business, and perform any labor or services, on her sole and separate account; and the earnings of any married woman from her trade, business, labor, or services, shall be her sole and separate property, and may be used and invested by her in her own name; and she may sue and be sued as if sole in regard to her trade, business, labor, services, and earnings; and her property acquired by her trade, business, and service, and the proceeds thereof, may be taken on any execution against her."

By St. 1857, c. 249, § 6, it was provided that a husband should not be bound by his wife's contracts in respect to her separate property, or to her trade.

The rights of married women in respect to their labor are thus defined in Gen. Sts. c. 108.

"Sect. 1. The property both real and personal which any married woman now owns as her sole and separate property, that which comes to her by descent, devise, bequest, gift, or grant, that which she acquires

by her trade, business, labor, or services, carried on or performed on her sole and separate account . . . shall, notwithstanding her marriage, be and remain her sole and separate property, and may be used, collected, and invested by her in her own name, and shall not be subject to the interference or control of her husband, or liable for his debts."

§ "Sect. 3. A married woman may bargain, sell, and convey her separate real and personal property, enter into any contracts in reference to the same, carry on any trade or business, and perform any labor or services on her sole and separate account, and sue and be sued in all matters having relation to her separate property, business, trade, services, labor, and earnings, in the same manner as if she were sole."

"Sect. 5. The contracts made by a married woman in respect to her separate property, trade, business, labor, or services, shall not be binding on her husband, nor render him or his property liable therefor; but she and her separate property shall be liable for such contracts in the same manner as if she were sole.

"Sect. 6. Payment may be made to a married woman for wages earned by her labor," etc.

By St. 1862, c. 198, amended by St. 1881, c. 64, § 1, a married woman doing business on her separate account must record a certificate in the town or city clerk's office setting forth various particulars; or her husband may file such certificate. In case of failure to do so, her property will not be protected against his creditors, and he will be liable on her contracts.

By St. 1874, c. 184, § 1, "A married woman may . . . make contracts, oral and written, sealed and unsealed, in the same manner as if she were sole, and all work and labor performed by her for others than her husband and children shall, unless there is an express agreement on her part to the contrary, be presumed to be on her separate account." And by § 3, "A married woman may sue and be sued in the same manner and to the same extent as if she were sole, but nothing herein contained shall authorize suits between husband and wife."

This enumeration of statutes shows the growth of the legislation on this particular subject, and the foregoing provisions are now embodied in a somewhat compressed form, in Pub. Sts. c. 147.

By virtue of this legislation, a married woman becomes, in the view of the law, a distinct and independent person from her husband, not only in respect to her right to own property, but also in respect to her right to use her time for the purpose of earning money on her sole and separate account. She may perform labor, and is entitled to her wages or earnings. If she complies with the statutory requirement as to recording a certificate, she may carry on any trade or business on her sole and separate account, and take the profits, if profits there are, as her separate property. Her right to enter into contracts, to earn money, to engage in performing labor or service, to enter into trade on her own account, is inconsistent with the view that her capacity to labor belongs exclusively to her husband. He can appropriate neither

her earnings nor her time. Her right to employ her time for the earning of money on her own account is as complete as his; subject to the requirement of recording a certificate in case she enters into trade. This may interfere with his right to and enjoyment of her society and services. But this is a consequence which the Legislature must be deemed to have foreseen and intended. His right in these respects is now made subordinate to her right to employ her time in the care and management of her property, and in the earning of money by performing labor or by carrying on a trade or business. So far as the statutes have given to her a right to act independently of him, so far his rights and control in respect to her are necessarily abridged. He can no longer compel her to work for him during such time as she may choose to perform labor on her sole and separate account.

By the common law, the husband was bound to support his wife, and therefore was entitled to her services. By the statutes, which modify the common law, his right to her services is abridged, though his obligation to support her remains.

It is urged in argument that she may contract to devote her whole time to work which is to be performed away from his home, and which perhaps may require her absence for ten years, thus amounting to a desertion, which would be in violation of her matrimonial duty. But the possibility of extreme cases should not conclusively determine the construction of statutes, nor do we now decide whether the statutes would permit such action on her part against his consent. To a certain limited extent, as, for example, in fixing the domicile, and in being responsible under ordinary circumstances for its orderly management, the husband is still the head of the family. But in some particulars a married woman is now independent of her husband's control. In the case now before us, the impairment of the plaintiff's capacity to labor was an element which might be considered by the jury in the estimate of her damages. In respect to this, as with other elements of damages, no close approximation to mathematical accuracy can in all cases be reached. In some instances, the right of a married woman to perform labor for others may have no money value. How much, if anything, should be allowed on this ground, must be left to the jury to determine, under the circumstances of each particular case.

The radical nature of the change effected by the legislation of this State in the legal condition of married women is illustrated in numerous decisions, of which *Jordan v. Middlesex Railroad*, 138 Mass. 425, most nearly resembles the present case in its facts. But see also *Parker v. Simonds*, 1 Allen, 258; *Ames v. Foster*, 3 Allen, 541; *Plumer v. Lord*, 5 Allen, 460; *Chapman v. Foster*, 6 Allen, 136; *Stewart v. Jenkins*, 6 Allen, 300; *Chapman v. Briggs*, 11 Allen, 546; *Burke v. Cole*, 97 Mass. 113; *Snow v. Shelton*, 126 Mass. 332; *Read v. Stewart*, 129 Mass. 407; *Pacific National Bank v. Windram*, 133 Mass. 175; *Butler v. Ives*, 139 Mass. 202; *Binney v. Globe National Bank*, 150 Mass. 574.

Exceptions sustained.

ATCHISON, T., & S. F. R. CO. v. DICKEY.

1895. 1 *Kansas Courts of Appeals*, 770.¹

COLE, J. This was an action brought in the District Court of Finney County, Kansas, by T. M. Dickey, as the husband of Jane Dickey, in which he seeks to recover from the railroad company for alleged loss of services consequent upon the injury of Jane Dickey through the negligence and carelessness of said company. There was a verdict and judgment for the plaintiff below, and the railroad company brings the case here for review.

The petition alleges that for a long time previous to the 29th day of October, 1888, and at the time of filing said petition the plaintiff and Jane Dickey were husband and wife. It then alleges that Jane Dickey, on Oct. 29, 1888, while a passenger on the defendant railroad, sustained serious damage by reason of the negligence of the railroad company. The petition then alleges that by reason of such injuries so inflicted on his wife the plaintiff has been compelled to expend large sums of money for medical attendance, medicine, and nursing, and for other purposes in caring for her during the illness caused by said injury, and that by reason of the nature and permanent character of the injuries so inflicted upon his wife, plaintiff has been and will be put to great expense for the proper care of his wife, and has been and will be deprived of her services, to his damage in the sum of \$5,000.

To this petition the defendant railroad company filed its general demurrer, which was by the court overruled, which ruling is assigned as the first error in this case. The grounds urged by counsel for plaintiff in error, upon which it is claimed the demurrer should have been sustained, are: (1) That the petition should have alleged not only that the plaintiff and Jane Dickey were husband and wife at the time the injuries were alleged to have been received by her and at the time the action was commenced, but should also show that the plaintiff and Jane Dickey lived and cohabited together during such time, and that such actual relations existed between them as would indicate that plaintiff was entitled to her services; . . .

[Omitting second ground of demurrer, and the opinion thereon.]

The other objection [viz., the first ground of demurrer] raises a more serious question. It is true that the rule formerly was that husband and wife are one person, and that he has the exclusive right to the labor, services and earnings of the wife, and, if this rule still obtains, it follows as a natural result that an allegation of the marital relation would be sufficient. But, this old rule has been radically and, we think, wisely changed. Many of the restraints and disabilities of coverture have been removed by positive legislative enactment, so that to-day, in this State, a married woman may carry on any trade or

¹ Only part of the report is given.—Ed.

business, perform any labor or service, and her earnings from said trade or business, labor or service, are her sole and separate property, and she may sue both to protect and enforce her rights in the same manner as if she were unmarried. It follows from this, as was said in an opinion delivered by Mr. Justice Johnston, in *City of Wyandotte v. Agan*, 37 Kansas, 530:—

“That the time and services of the wife did not necessarily belong to the husband, nor does an injury which causes the loss of such time and service necessarily accrue to him. At least a portion of her time may be given to the labor or business done on her sole and separate account. The profits or earnings of such labor or business are her sole and separate property, and cannot be appropriated or controlled by her husband without her consent. So far, then, as she is deprived of these she suffers a loss which is personal to herself, for which she alone can recover. The fact that she is partially or wholly dependent upon the husband for support does not abridge her right of action, nor transfer to him that which accrued solely to her.”

[The learned Judge then stated, and quoted from, the decision in *Townsdin v. Nutt*, 19 Kansas, 282.]

From the doctrine announced in these two cases it plainly appears that a pleading which simply alleges the marital relation does not tender an issue as regards the services of the wife, either as a cause of action or as a defence. Nor do we think that the further allegation contained in the petition in this case, that by reason of the injuries complained of the plaintiff “has been and will be deprived of her services,” is sufficient to remedy this defect. This latter allegation is a statement of a conclusion alleged by the pleader to be the natural result of the injuries sustained, and not the result of any relationship existing between the plaintiff and the injured party by reason of which plaintiff was entitled to such services. It could only have the force contended for by the defendant in error by invoking the aid of the old rule of law which the later decisions and statutory enactments have so radically changed. Upon the first objection urged by the plaintiff in error the demurrer should have been sustained.

[Remainder of opinion omitted.]

KELLEY v. N. Y., N. H., & H. R. CO.

1897. 168 *Massachusetts*, 308.

TORT, to recover consequential damages arising from personal injuries to the plaintiff's wife, Mary J. Kelley, occasioned by the defendant's negligence. Trial in the Superior Court, before DEWEY, J., who allowed a bill of exceptions, in substance as follows.

This action was tried at the same time with an action brought by the plaintiff's wife to recover for injuries which she herself had suffered.

There was evidence tending to show that on October 23, 1894, the

plaintiff's wife, while a passenger on a train of the defendant, was injured; and the defendant admitted that her injuries were caused by the negligence of its servants, and that she was at the time in the exercise of due care.

There was also evidence tending to show that the plaintiff's wife, prior to the accident, had been in good health, and had done the housework, cooking, and washing in the plaintiff's household, and had taken the entire care of two children; that in the accident referred to she had suffered a fractured shoulder blade, an injury to her womb causing a retroversion and pain for some time, and numerous severe bruises; that after the injury she had returned to the plaintiff's home, and for five or six weeks had had one arm bandaged, and had been unable for a considerable length of time to do any work about the plaintiff's house, and because of her injuries had been compelled to wean her child, which she was then nursing; that her capacity to work was permanently impaired, and she had been made irritable, pallid, thin, and weak; and that since the accident she had continued to live with the plaintiff, and on October 21, 1895, had borne him a child; and there was no evidence, other than reasonable inferences from the foregoing facts, that any change had occurred in their relations toward one another as husband and wife. There was further evidence that the plaintiff had incurred expenses for medical attendance, nursing, and medicine for his wife, to the amount of over \$1,000.

At the close of the evidence, the defendant requested the judge to rule as follows:

"1. Upon all the evidence the plaintiff cannot recover.

"2. The division of the rights to recover, which by law are made between the husband and the wife, does not in any sense increase the aggregate right of recovery, and the damages which are to be divided between the husband and the wife should not in the aggregate exceed the damages which the wife, if unmarried, would be entitled to recover."

The judge declined to give the first ruling requested, but gave the second, with the qualification that one additional element should be considered, namely, the loss of consortium by the husband; and the defendant excepted.

The judge also instructed the jury that, although the wife's time and capacity to earn were her own, yet there was a residuum to which the husband was entitled which could best be defined by the word consortium, meaning fellowship, society, or communion, for the loss of which he alone was entitled to recover; and the defendant excepted.

The jury returned a verdict for the plaintiff in the sum of \$616; and the defendant alleged exceptions.

J. H. Benton, Jr. & C. F. Choute, Jr., for the defendant.

J. E. Cotter, for the plaintiff.

ALLEN, J. In *Bigaouette v. Paulet*, 134 Mass. 123, a husband's action for loss of consortium with his wife was held to be maintainable, although there was no loss of service or payment of expenses in consequence thereof. And in *Bennett v. Bennett*, 116 N. Y. 584, it is said that the basis of the husband's action for loss of consortium is his right to the conjugal society of his wife, and that it is not necessary that there should be proof of any pecuniary loss or loss of service.

The present case was tried with an action brought by the plaintiff's wife, and the same jury fixed the damages in both cases. The defendant took exceptions in this case, but none in the action brought by her. The jury were instructed that the division of the rights to recover, which by law are made between the husband and the wife, does not in any sense increase the aggregate right of recovery, and that the damages which are to be divided between the husband and the wife should not in the aggregate exceed the damages which the wife, if unmarried, would be entitled to recover; with the qualification, however, that one additional element should be considered, namely, the loss of consortium by the husband. The defendant contends that now an action will not lie for loss of consortium, or at least that it will not in case of an injury to her through negligence, and that the incurring of expenses will not alone give a ground of action.

It might be sufficient to dispose of this case to say that the plaintiff was bound to support his wife, and that expenses incurred by him appear to have exceeded the amount of the verdict, and that therefore the defendant's exceptions should be overruled; but in view of the ruling at the trial allowing the jury to take into account the plaintiff's loss of consortium, and of the defendant's request that the correctness of this ruling should be determined, we proceed to consider it.

By the common law it is quite clear that a husband might maintain an action in his own name alone for an injury to his wife which resulted in his loss of consortium with her; as, for example, for an injury caused by an assault and battery upon her, by medical or surgical malpractice, or by other negligence. *Hyde v. Scysson*, Cro. Jac. 538; *Guy v. Lusy*, 2 Rol. R. 51; *Russell v. Corne*, 2 Ld. Raym. 1031; *Dix v. Brookes*, 1 Stra. 61; *Smith v. Hixon*, 2 Stra. 977; 2 Rol. Abr. Trespass, (Y) 16, p. 556; Hale's Anal. of Law, 96; 3 Bl. Com. 140; 1 Chit. Pl. (7th ed.) 83; Yelv. (Met. ed.) 89; *Baker v. Bolton*, 1 Camp. 493; *Carey v. Berkshire Railroad*, 1 Cush. 475, 478; *Barnes v. Hurd*, 11 Mass. 59; *Laughlin v. Eaton*, 54 Maine, 156; *Hopkins v. Atlantic & St. Lawrence Railroad*, 36 N. H. 9, 14; *Lewis v. Babcock*, 18 Johns. 443; *Matteson v. New York Central Railroad*, 35 N. Y. 487; *Jones v. Utica & Black River Railroad*, 40 Hun, 349 (a case much like the present); *Berger v. Jacobs*, 21 Mich. 215; *Hyatt v. Adams*, 16 Mich. 180; *Long v.*

Morrison, 14 Ind. 595; *Nixon v. Ludlam*, 50 Ill. App. 273; *Mewhirter v. Hatten*, 42 Iowa, 288; *Mowry v. Chaney*, 43 Iowa, 609; *Smith v. St. Joseph*, 55 Mo. 456.

The contention of the defendant, therefore, must rest entirely on the ground that the husband has lost this right of consortium by reason of the legislation of this Commonwealth increasing the rights of married women. *Harmon v. Old Colony Railroad*, 165 Mass. 100. But there has been no substantial change in the statutes upon this subject since the decision in *Bigaouette v. Paulet*. Notwithstanding the progress of legislation in giving to married women the control of their time and actions, this right of the husband is not destroyed. The unity and identity of interest which by the common law existed between husband and wife have been impaired. *Butler v. Ives*, 139 Mass. 202. They are not, however, entirely done away with. The husband's right to compel his wife to work for him is abridged, but he still has a right to her society and assistance, which is different in character and degree from that which other people have, or which she is at liberty to give to them. By marriage, both husband and wife take upon themselves certain duties and obligations towards each other, in sickness and health, which it cannot be supposed that the Legislature has intended wholly to uproot. A married woman may now perform any labor or services on her sole and separate account, as her husband may; nevertheless, each owes certain duties to the other which are not annulled by the statutes. *Mewhirter v. Hatten*, 42 Iowa, 288. These duties are included in the word consortium; but the extent of these duties, or of the right of consortium, need not now be determined. The only question presented to us is, whether the presiding justice was right in allowing the jury to consider at all the loss of consortium.

It is argued by the defendant, that, if a husband has a right to recover for the loss of consortium through an injury caused by negligence, a wife also would have the same right, by virtue of the existing statutes, in case of such an injury to her husband; and that this has never been held or even contended for. She has no such right at common law; but whether she has by statute we do not now consider. The question has been considered elsewhere, but the decisions are not in harmony.

Exceptions overruled.

SECTION XVII.

Action for Criminal Conversation.

MARY KROESSIN v. WILHELMINA KELLER.

1895. 60 *Minnesota*, 372.

APPEAL by defendant from an order of the district court for Stearns county, Searle, J., overruling a demurrer to the complaint. Reversed.

Theo. Bruener and *D. T. Calhoun*, for appellant.

At common law the actions by a husband for enticing away his wife and for criminal conversation were distinct. The basis of the action for criminal conversation does not exist where the wife is plaintiff. *Doe v. Roe*, 82 Me. 503, 20 Atl. 83; *Duffies v. Duffies*, 76 Wis. 374, 45 N. W. 523. The acts relating to married women do not create any new cause of action. The wife had no cause of action at common law. See *Winsmore v. Greenbank*, Willes, 577; Bigelow, Lead. Cas. 328. The cases relied on to sustain the action are nearly all for enticing away.

Geo. H. Reynolds, for respondent.

Under G. S. 1894, § 5530, the wife "shall receive the same protection of all her rights, as a woman, which her husband does, as a man, and for any injury sustained to her reputation, person, property, character, or any natural right, she shall have the same right to appeal, in her own name alone, to the courts of law or equity, for redress and protection that her husband has to appear in his name alone." In states where there are statutes not nearly so broad and comprehensive as in Minnesota, a married woman can maintain an action for alienation of her husband's affections. *Card v. Foot*, 57 Conn. 427, 18 Atl. 1027; *Bennett v. Bennett*, 116 N. Y. 584, 23 N. E. 17; *Jaynes v. Jaynes*, 39 Hun, 40; *Mehrhoff v. Mehrhoff*, 26 Fed. 13; Cooley, Torts (2d Ed.), 267, note 2; *Holmes v. Holmes*, 133 Ind. 386, 32 N. E. 932; *Waldron v. Waldron*, 45 Fed. 315; *Reed v. Reed*, 6 Ind. App. 317, 33 N. E. 638.

COLLINS, J. This is an action brought by a married woman against one of her own sex to recover damages, following, in a general way, the common-law form of declarations in crim. con. A general demurrer to the complaint was overruled in the court below, and by this appeal we are required to determine whether such an action can be maintained; the right to recover being based solely on alleged adulterous acts between plaintiff's husband and the defendant. It is to be noticed here that it is not alleged that the defendant was the seducer of the husband, or that plaintiff has been deprived of his support; nor is it an

action for enticing the husband away, or for inducing him to abandon or desert his wife. We are quite safe in saying that at common law no such action could have been maintained. The injured husband alone brought crim. con., and he could sustain the action by simply showing adulterous intercourse. The grounds on which the right to recover was based are well stated in Cooley on Torts, 224, and the principal elements were the disgrace which attached to the plaintiff as the husband of the unfaithful wife,—and no such disgrace has ever rested upon the wife, if there was one, of the guilty defendant,—and, of more importance, the danger that a wife's infidelity might not only impose on her husband the support of children not his own, but still worse, cast discredit upon the legitimacy of those really begotten by him. Because of these elements, the man was always conclusively presumed to be the guilty party. In the eye of the law, the female could not even give her consent to the adulterous acts, and, as a result, it was no defense in this form of action that the defendant had been enticed into criminal conversation through the acts and practices of the woman. From this statement as to the grounds or elements constituting this action, it will be seen that the principal ones cannot possibly exist or be involved in a similar action brought by a wife. And what has been said about the unavailability of the defense that the defendant himself was the victim, and not the seducer, is suggestive of what the courts might have to hold to be the rule of pleading, and what they might have to inquire into, upon the trial of an action of this kind. Would it be held, following the old rule we have mentioned, and for which the reason seems well founded, that it was no defense for the female sued to allege and prove that she was the party seduced, and that the greater wrong and injury had been inflicted upon her, not upon the plaintiff wife? or would the contrary rule prevail? But we need not consider the subject further, for a moment's reflection will suggest the remarkable results flowing from the adoption of either rule.

We have been cited to quite a number of cases, determined in the courts of last resort in this country, in which it has been held, without much stress being laid on statutes concerning the rights of married women, that an action may be maintained by a wife against one who wrongfully induces and procures her husband to abandon or send her away. *Westlake v. Westlake*, 34 Ohio St. 621, the court being divided in opinion, is a leading case on this view of the subject. A later one, announcing the same doctrine, but made to rest much more on the married woman's acts in the state of Michigan, and similar to our own, is *Warren v. Warren*, 89 Mich. 123, 50 N. W. 842. The plaintiff's counsel has been industrious in collecting this class of cases in his brief, and to them we add *Price v. Price* (Iowa), 60 N. W. 202. But even on this proposition, and despite broad statutory enactments affecting the rights of married women, the courts are not entirely agreed, for in Maine and Wisconsin it has been held that such an action cannot be maintained. *Doe v. Roe*, 82 Me. 503, 20 Atl. 83;

Duffies v. Duffies, 76 Wis. 374, 45 N. W. 522. But we need not decide, as between these cases, for the exact question raised by the demurrer here was not the one under consideration in any we have cited. They were brought for enticing away the husband; causing him to withdraw his support from the wife; to abandon or desert her. — an entirely distinct and separate cause of action from that set out in the plaintiff's complaint. At common law this form of action was wholly different in pleadings and proof, as well as parties, from crim. con. It proceeded, and still proceeds, upon different grounds, and we do not regard cases of that nature as authority in this. We are not unmindful of the fact that plaintiff's counsel has presented two cases — *Seaver v. Adams* (N. H.), 19 Atl. 776, and *Haynes v. Nowlin*, 129 Ind. 581, 29 N. E. 389 — in which it is held that an action by a wife against another woman, based on a complaint very much like this, will lie. But in these cases the authorities before referred to are cited and relied on as directly in point. The courts rendering these decisions do not seem to have considered that there is, and inevitably must be, a marked distinction between an action charging a defendant with having induced and enticed a husband to withdraw his support from his wife and to abandon and desert her and one similar to crim. con. We think the difference noticeable and material, although we do not wish to be understood as holding that the one first mentioned will lie. That question is not before us, and we simply express our conviction that a wife cannot maintain an action in the nature of crim. con. Such actions would “seem to be better calculated to inflict pain upon innocent members of the families of the parties than to secure redress to the persons injured.” The power to bring such actions would furnish wives “with the means of inflicting untold misery upon others, with little hope of redress for themselves.” We find nothing in our statutes in respect to the rights of married women which indicates that the power to proceed in this form of action was intended to be conferred. Attention has been called to G. S. 1894, § 5530 (Laws 1887, c. 207, § 1). We have heretofore had occasion to comment upon that act, and have not changed our views as then expressed. *Althen v. Tarbox*, 48 Minn. 18, 50 N. W. 1018.

Order reversed.

SECTION XVIII.

Action for Alienating Affection of Spouse.

HAYNES v. NOWLIN.

1891. 129 *Indiana*, 581.

FROM the Dearborn Circuit Court.

W. S. Holman, W. S. Holman, Jr., H. D. McMullen, and W. R. Johnston, for appellant.

G. M. Roberts, C. W. Stapp, J. K. Thompson, M. J. Givan, and N. S. Givan, for appellee.

ELLIOTT, C. J. The question which the record presents arises upon the ruling of the trial court sustaining a demurrer to the appellant's complaint. The question which requires our consideration and judgment is this: Can a married woman maintain an action against one who wrongfully entices her husband from her and alienates his affections?

It was the boast of the common law that "there is no right without a remedy," and, in the main, this boast was not an idle one, but was made good by the vindication of legal rights in almost all instances where the right was appropriately presented for judicial consideration and determination. Some of the courts, however, sacrificed the principle outlined in the maxim to the demands of fancied consistency, and surrendered a clear and strong right to a barren technical rule, for they held that a wife could not maintain an action for the loss of the society, support and affections of her husband. The fiction that the *baron* and *feme* were one person so far swayed the judgments of some of the courts as to carry them from a sound fundamental principle, and cause them to declare a doctrine revolting to every right-thinking person's sense of justice, and contrary to the foundation principles of natural right. We say that some of the cases did this, for not all gave the doctrine we refer to support, but, on the contrary, denied it, by holding that the wife might have a right of action against the wrong-doer who took her husband from her. To these cases we shall presently refer. The principle outlined in the maxim quoted requires that, even where the common law as it now exists prevails, it should be held that a wife may have an action against the wrong-doer who deprives her of the society, support and affections of her husband. If there is any such thing as legal truth and legal right, a wronged wife may have her action in such a case as this, for in all the long category of human rights there is no clearer right than that of the wife to her husband's support, society and affection. An invasion of that right is a flagrant wrong, and it

would be a stinging and bitter reproach to the law if there were no remedy. The virtue of elasticity which has been so often ascribed to the common law, and generally very justly, is nowhere more clearly or beneficially manifested than it is in relation to the rights of married women. Long since the doctrine of feudal times, which gave so many, and such comprehensive rights, to the *baron* and so few, and such narrow ones, to the *feme*, has given way before the enlightened thought of better ages and less barbarous times. One who should now, either in England or America, attempt to secure an enforcement of the old rules which placed the wife in such abject subjection to the husband, and stripped her of so many rights which belong, in natural justice, to a rational human being, would find a stern denial. It is beyond controversy that without the aid of statutory enactments the harsh, unreasonable rules of the old common law have fallen before the spirit of enlightened reason and true progress.

The doctrine that the wife could not maintain an action against one who deprived her of her husband violates the old maxim that "Reason is the life of the law," for there can be no reason in a rule which gives the stronger a right of action for an injury and denies it to the weaker. If the strong may maintain an action, the greater the reason why the weak may do so. If the *baron* may recover from one who entices away the *feme*, surely the same reason that supports the rule giving the former a right of action must give a like right to the latter. The reason is the same, but the degree is not, for the reason intensifies in power when invoked by the injured wife. The decisions which denied the wronged wife a right of action broke the line of consistency and marred the symmetry of the law. We have spoken of the decisions under the common law, but we do not feel called upon to discuss them at length; that has been ably done by the courts which have given the subject consideration. *Bennett v. Bennett*, 116 N. Y. 584; *Lynch v. Knight*, 9 H. L. Cases, 577; *Breiman v. Paasch*, 7 Abb. N. C. 249; *Baker v. Baker*, 16 Abb. N. C. 293; *Jaynes v. Jaynes*, 39 Hun, 40; *Warner v. Miller*, 17 Abb. N. C. 221; *Churchill v. Lewis*, 17 Abb. N. C. 226; *Foot v. Card*, 58 Conn. 1.

The decisions to which we have referred, and the authorities they adduce, prove, beyond debate, that even at common law the right of action for a personal wrong was in the wife. We assume, therefore, that the right of action for a wrong suffered by the wife was in her, and not in the husband. Any other conclusion is, indeed, logically inconceivable.

As the right of action for a personal injury was always in the wife, she is, of necessity, the real party in interest, and, upon reason and principle, she ought always to have been held to be the party entitled to prosecute the action for the invasion of that right. That it was not so held was owing to the power of the legal fiction that

she and her husband were one, for from this fiction came the stiff, unreasonable rule, that in all actions she must join her husband. Equity, however, never gave full recognition to this technical doctrine. Our statute, years ago, gave the wife a right to sue alone, and thus — adopting the chancery doctrine and abrogating that of the common law — broke down the only position upon which it could, with the slightest plausibility, be asserted that she could not sue one who wrongfully took her husband from her, since upon the ground that she could not sue alone was rested the doctrine denying her a right to sue one who enticed away her husband. It was never asserted by the better considered cases, nor by the abler text-writers, that she did not herself possess the substantive right upon which the cause of action was founded. The reason that she could not maintain such an action was, not that she was not the source of the substantive right, but that there was no remedy available to her for the vindication of the right. When the statute supplied the remedy by breaking down the barrier which stood between her and a recovery, it clothed her with full right to enforce her just and meritorious cause of action. We know that in the case of *Logan v. Logan*, 77 Ind. 558, a different doctrine was declared, but that decision was by a divided court, and the question was not fully considered. Not a single authority was there adduced, nor is there any consistent line of reasoning. We should be strongly inclined to deny the soundness of that decision if it were necessary to do so, but it is not necessary that we should overrule it, for, since the cause of action there declared invalid arose, radical changes have been made by statute. The rights, as well as the obligations of married women, have been greatly enlarged. In many cases it has been affirmed of married women that under the present statute "ability is the rule and disability the exception." *Rosa v. Prather*, 103 Ind. 191; *Arnold v. Engleman*, 103 Ind. 512 (514); *McLead v. Ætna L. Ins. Co.*, 107 Ind. 394; *City of Indianapolis v. Patterson*, 112 Ind. 344; *Bennett v. Mattingly*, 110 Ind. 197; *Strong v. Makeever*, 102 Ind. 578; *Lane v. Schlemmer*, 114 Ind. 296 (301); *Phelps v. Smith*, 116 Ind. 387 (402); *Young v. McFadden*, 125 Ind. 254; *Miller v. Shields*, 124 Ind. 166.

It seems to us very clear that, in view of the facts that true principle requires that a married woman should have a remedy for the vindication of a violated right, and that her rights and obligations have been so greatly increased and enlarged by the enabling statutes, she may have redress against one who wrongfully takes her husband from her.

Every radical and express change in the law carries with it corresponding and incidental changes. These incidental changes are inseparable from the essential express changes, and are wrought by the Legislature. No part of the law can be expressly changed without causing incidental changes. To hold otherwise would be to

frustrate the legislative purpose and break the law into isolated parts and disjointed fragments. It must follow from this doctrine that, when the statutes gave a married woman the right to sue alone, and changed her *status* so as to invest her with the general property rights of a citizen and impose upon her almost the same obligations as those resting upon all citizens free from disability, they clothed her with the right to appeal to the courts to redress the wrong inflicted by one who tortiously wrested from her the support, society and affections of the husband.

In adjudging, as we do, that this action can be maintained, we believe that we build on solid principle, and we know that we are sustained by able courts. The authorities already adduced give our conclusion support and to them we add: *Seaver v. Adams* (N. H.), 17 Atl. R. 776; *Mehrhoff v. Mehrhoff*, 26 Fed. R. 13; *Westlake v. Westlake*, 34 Ohio St. 621; *Postlewaite v. Postlewaite*, 1 Ind. App. 473. See, also *Duffies v. Duffies*, 31 Cent. L. J. 29. The views of the text-writers are in harmony with our conclusion. Mr. Bigelow says: "To entice away, or to corrupt the mind and affections of one's consort is a civil wrong for which the offender is liable to the injured husband or wife." Bigelow Torts, 153. Judge Cooley says: "We see no reason why such an action should not be supported where, by statute, the wife is allowed, for her own benefit, to sue for personal wrongs suffered by her." Cooley Torts, 228, *n.* Mr. Bishop clearly and strongly states the rule. He says: "Within the principles which constitute the law of seduction, one who wrongfully entices away a husband, whereby the wife is deprived of his society, and especially also of his protection and support, inflicts on her a wrong in its nature actionable. We have seen that by the common law rules, which forbid the wife to sue for a tort except by joining the husband as co-plaintiff, she is practically without an available remedy. But under the modern statutes as they are shaped in many of our States, she can hold property at law, bring suits to secure it, and maintain actions of tort, in her own name and with no interference from her husband. So that where a statute of this sort prevails, she has her action against the seducer of the husband, who has thus wrongfully deprived her of his society and care." 1 Bishop Marriage and Divorce, section 1358.

Judgment reversed.

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